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**In the United States
COURT OF APPEALS
for the Ninth Circuit**

ALEXANDER S. PAGE, JR.,

Libelant and Appellant,

vs.

UNITED STATES OF AMERICA, as represented by
the United States Maritime Commission, successors
to the War Shipping Administration, and MOORE-
McCORMACK LINES, INC., a corporation,

Respondents and Appellees.

BRIEF OF APPELLEES

Upon Appeal from the United States District Court
for the District of Oregon.

HENRY L. HESS,
United States Attorney,

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Assistant United States Attorney,

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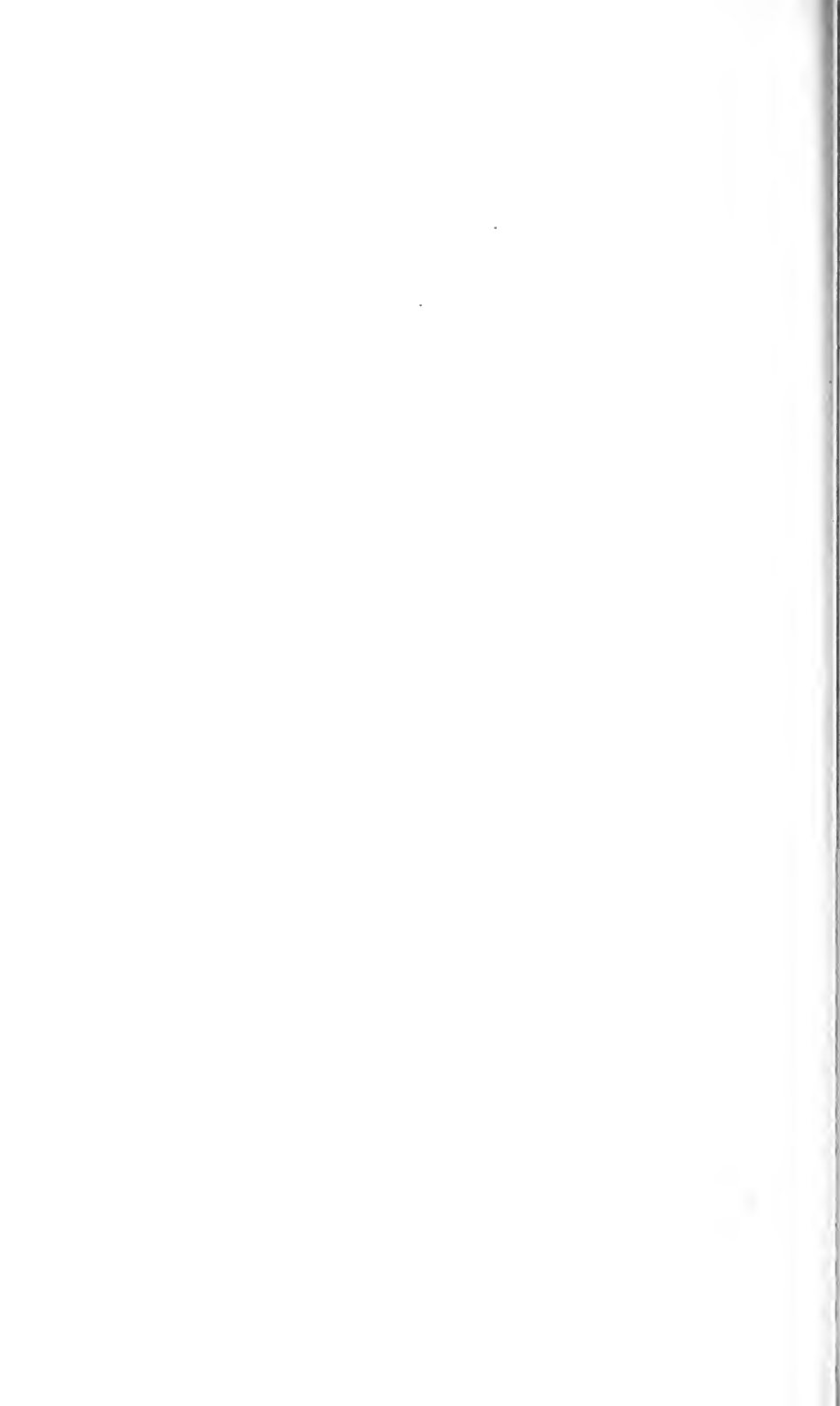
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for the District of Oregon.

STATEMENT OF THE CASE

The facts are set forth in the trial court's Findings
of Fact (Ap. 19-23) and appellees adopt them as a clear
statement of the case.

ARGUMENT

The trial court's Findings are fully supported by the
testimony of the witnesses, all given in open court, and

the facts therein stated are in themselves a sufficient argument to affirm the decree. Libelant, pursuant to a routine order to do a minor routine job, stepped on a valve cover, not intended for that purpose, and slipped off it. He need not have stood on the valve cover at all. He could have reached the work from the floor-plates or from the first grating above the floor plates, or if he did not choose these methods, he had two ladders available to him. The case is governed by *Vileski v. Pacific-Atlantic S. S. Co.*, 163 F. (2d) 553, in this Circuit. Cf. *The Swift Arrow*, 1930 A.M.C. 1740; *Bassett v. City of New York*, 13 Fed. Supp. 1022; *The Quinnipiac*, 1926 A.M.C. 1150; *The Hollywood*, 1925 A.M.C. 1165. The order to libelant to grind in the slide valve was a general order. No details were specified. Everything was left to libelant, which was quite proper, for, as he said himself, he knew how to do it (Ap. 47-8).

The claim that heavy seas were running, causing the ship to roll unduly, is utterly disproved. The log book entry is: "Light E'ly Breeze and Sea" (Log, April 17th). The wind was only Force 2 (Log, April 17th). The condition of the sea was "1" (Log, April 17th).

The claim that libelant's physical condition was such that he should not have been ordered to do this work "while heavy seas were running" (not true) is likewise without merit. He hired himself out to do it. He had been making many voyages without any trouble; in fact he had just returned from one. He told the chief engineer that he could do the work. And he could. In fact he did similar jobs both before and after the one

on April 17th. The Engineroom Log shows that on his day watch, April 13th, he "Repaired Governor on outboard service pump"; on his night watch, April 20th, he "Overhauled drain valves on outboard feed pump"; on his night watch, April 21st, he "Overhauled drain valve and ground in slide valve on starboard fuel oil service pump". Dr. Kimberley says that even after this accident Page was "surprisingly well" and was fit to go to sea and resume his calling as a seaman (Ap. 169).

The order, therefore was merely a simple one to do a small routine job, within the scope of Page's duties and knowledge, and no authorities are needed to show that this is not negligence.

When Page stepped on the valve cover, a place never intended to be used as a step, he took whatever risk was attendant thereon. First, because if it was oily or greasy, as he said, this, according to his statement (Ap. 62), is a normal condition on most ships, though he modified this statement later. Second, he took the risk because, if they were oily or greasy, it was up to him to wipe them off. Third, and most important, he took the risk because the valve cover was never intended as a step in the first place. Page should not have used it. He should have stood on the floor-plates or on the grating above, as demonstrated in the photographs in evidence; or, if he did not want to do that, he should have got one of the two ladders which were available. *Vileski v. Pacific-Atlantic S. S. Co., supra*, controls.

Appellant's brief finds fault with the trial court's Findings of Fact because they do not state that libellant

struck his groin on a "rocker arm" when he slipped. The court found that "He did twist his body and in so doing strained and wrenched himself in the area of the old fracture". The "rocker arm" is just an incident to this general statement of this straining and wrenching. Of course whether he struck a "rocker arm" or not, is entirely immaterial on the question of liability; and is also immaterial on the extent of his injuries. These were specifically described, and the period of disability stated, by Dr. Kimberley, libelant's own witness, and this testimony, the most favorable to libelant, was accepted by the court.

The court denied damages, but allowed libelant \$274.88, wages to the end of the voyage, and bonus, and \$296 as maintenance (Ap. 29). Appellant's brief claims, Page 20, that he should have had "double wages". It is well known that the double-wages penalty statute never applies to unearned wages; as these were. *Halvorsen v. U. S.*, 284 F. 287; *The Vermar*, 1938 A.M.C. 890.

Appellant's brief claims, Page 22, that he should have had \$984 maintenance calculated for 164 days at \$6.00 a day, and objects to the trial court's allowance of \$296 as maintenance. The trial court's allowance was based on 74 days at \$4.00 a day.

Libelant did not furnish proof of his living cost, which is the basis of maintenance, and, strictly, respondents could have insisted on it. But they did not. The current rate for maintenance at the time of the injury, as established by the U. S. Maritime Commission, was \$3.50 a day for unlicensed men, and from \$4 to \$6 a

day for licensed men up to and through the grades of chief engineer and captain. Libelant was an unlicensed man although serving under a "waiver" as engineer. In these circumstances the court adopted the \$4-a-day rate established by the U. S. Maritime Commission and allowed 74 days at \$4 a day,—\$296.00.

It has always seemed to us doubtful whether libelant was entitled to any maintenance at all; for his injury did not *disable* him from work; he kept right on with his daily work on the ship until he left her in Kobe, and *then* it was not because of his injury on this ship that he left her, but because of his old injury on the SAMOA.

This is plainly apparent from the Certificates of the Army doctors at Osaka, who recommended that he be relieved and sent home (Libelant's Exhibits 17 and 35; and Respondents' Exhibit 18). Libelant's Exhibit 17 is merely a copy of 35, the original. They diagnose the case as:

"Un-united fracture neck of femur, right, A.i. 17 Apr. 1943 off coast of Oregon struck by Japanese Torpedo when on S.S. KATHLEEN L. BATES." (Name of ship an error for the SAMOA. Libelant was not on the BATES in 1943 and she was not torpedoed.)

Because of this old "un-united fracture", and not from any strain on the BATES, they recommended that libelant be relieved from duty, as too strenuous, and returned home as a passenger. Respondents' Exhibit 18 is to the same effect,—“an old non-united fracture”; recommends relief from “present duties”, and return to the United States as a passenger.

It is perfectly plain that this old non-united fracture from the torpedoing was the basis of their recommendations and not the trifling aggravation, if there was any, on the BATES at all. They do not even mention it. They simply found Page in the same condition that he was in when he joined the ship in Portland. It is for these reasons that we say the claim for maintenance is doubtful to say the least.

But if maintenance is to be allowed, here is the record:

Libelant was repatriated on the BLUE JACKET, arriving in San Francisco on May 23rd, and at his home in Portland on May 24th or 25th (Ap. 27). He does not claim maintenance from this date. He dates his claim from June 15th, as appears from Article II of his libel, where he alleges that he was "disabled after the return of said vessel (the KATHLEEN L. BATES) to the United States on June 15, 1946, to on or about December 20, 1946, except for approximately 6 weeks", etc. (Ap. 5-6). (The BATES returned earlier than this, as appears from some of the exhibits; but of course her return has no bearing on maintenance.)

Dr. Gurney Kimberley, the specialist who attended libelant on behalf of the Public Health Service, and who was libelant's principal and only medical witness, examined him at his own request (Ap. 45) on August 28, 1946, and reported that libelant had got along "surprisingly well", and was, on that date, "able to return to work as a seaman" (Libelant's Exhibit 5). Of course we cannot know how much *earlier* than that date he

would have been reported "able to return to work" if Dr. Kimberley had seen him earlier.

On this state of the record the Court allowed from June 15th to August 28th,—74 days. In doing so he accepted *libelant's own libel* as to when the period started, and *libelant's own witness* as to when it ended. We do not see how libelant could expect more. In fact, considering that the whole claim is doubtful for the reasons stated, we think he was generously treated.

That the decree was correct in dismissing the libel as to the General Agent, Moore-McCormack Lines, Inc., is now definitely established by the recent decisions of the United States Supreme Court in *McAllister v. Cosmopolitan Shipping Co., Inc.*, *Gaynor v. Agwilines*, and *Fink v. Shepard Steamship Co.*, 93 L. Ed., p.

The trial court's decree should be affirmed.

Respectfully submitted,

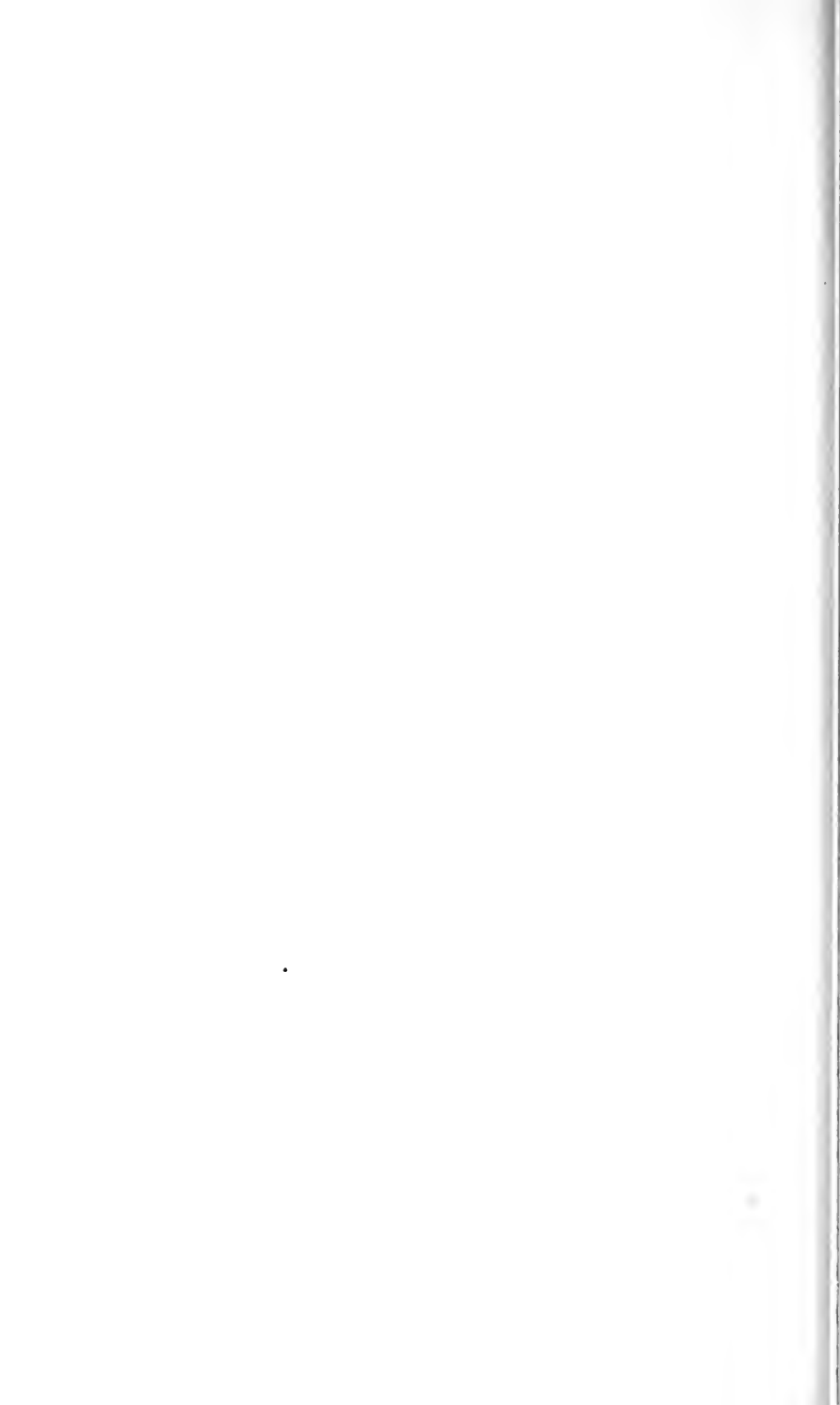
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In the United States
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for the Ninth Circuit

JOHN L. THURSTON,

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vs.

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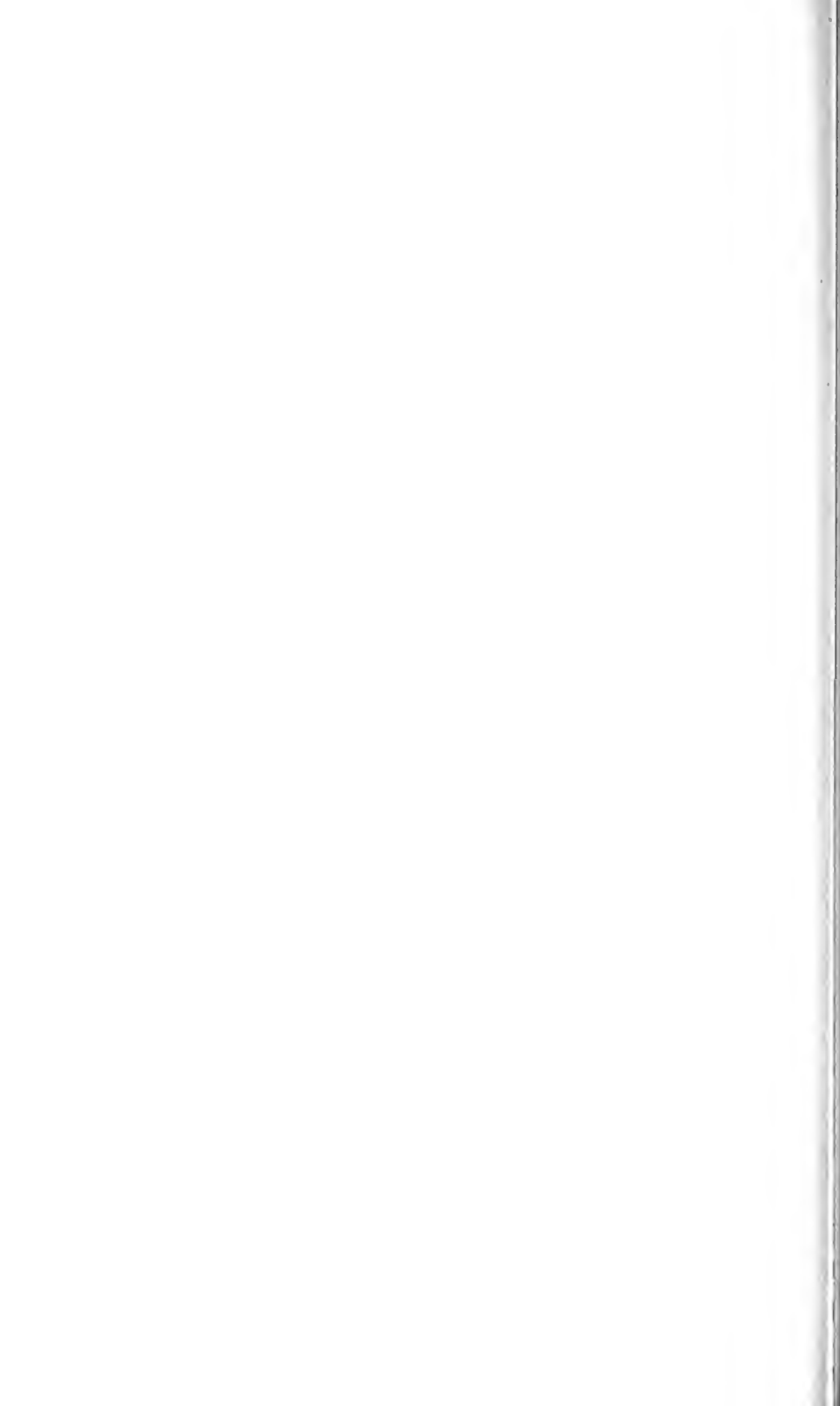
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Respondent-Appellee.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for
the District of Oregon.

STATEMENT OF THE CASE

The facts are set forth in the Trial Court's Findings of Fact, and appellee adopts them as a clear statement of the case.

ARGUMENT

Point I

Libelant-Appellant's claim for damages is barred by the two-year limitations period provided in the Suits in Admiralty Act.

Libelant sustained the injury for which this suit was brought on July 10, 1946. He commenced this suit by filing a libel in the District Court on August 4, 1948, more than two years later.

As pointed out in Appellant's brief (page 12) his libel was filed against the United States pursuant to the provisions of the Suits in Admiralty Act, 46 U.S.C.A. §742, 743, 745. The Suits in Admiralty Act provides that all suits, with certain exceptions not here applicable, "shall be brought within two years after the cause of action arises." 46 U.S.C.A. §745. It therefore appears that libelant's claim is time-barred.

Point II

On the merits of the case, the Trial Court's Findings and Conclusions are amply supported by the evidence.

Libelant was the third-assistant engineer, and stood the 8 to 12 watch in the engine room. It was his duty to make frequent inspections of the engine room, and to maintain safe working conditions. He was injured

more than two hours after commencing his watch, when he stepped into an opening in the floor plates, where one of the removable floor plates, frequently removed for the purpose of inspecting and cleaning the screens over the bilge suction lines, was removed. Libelant did not observe that the plate was removed, and stepped into the opening when going to turn on a valve during a routine fire and boat drill.

The Trial Court's Findings of Fact state:

“

IV.

As engineer on watch at the time of his accident, Libelant was the representative of the shipowner in charge of the engine room. He supervised the work of the oilers and firemen under him and who were subject to his orders. It was his duty to make any necessary inspection of the engine room and to maintain a reasonably safe place to work.

V.

The cause of Libelant's injuries was the opening in the floor plates. Libelant, in the discharge of his duty to make necessary inspections of the engine room and maintain a reasonably safe place to work, could and should have discovered this condition. His injuries, therefore, were proximately caused by his own failure to make adequate inspection of the engine room.

VI.

Libelant's injuries did not result from any negligence of Respondent in the discharge of any duty to Libelant, nor from any unseaworthiness of the vessel. The allegations of negligence and unseaworthiness as charged in the libel are not sustained

by the evidence. Therefore, Libelant is not entitled to recover damages."

These findings are the basis of the Trial Court's decision, and they are amply supported by the evidence.

Thurston himself testified that as third assistant engineer he stood a four hour watch twice a day, and "I had charge of the engine room for four hours and eight hours off and then four hours on." (Tr. 4). He assumed all the regular duties of third assistant engineer (Tr. 20). The oiler and fireman on his watch were subject to his orders (Tr. 22). It was his responsibility to maintain safe working conditions (Tr. 23). And to inspect and make rounds of the engine room (Tr. 24, 26). And it was his duty to know if there was accumulated oil or water over the tank tops at the bilge suction (Tr. 30).

Edmonston, the Chief Engineer, testified—"The engineer on watch is responsible for all the machinery and everything down below in the engine room and the fire room." (Tr. 75). It is the duty of the engineer on watch to make "a thorough inspection of all machinery before taking over the watch and a round of inspection at least every thirty minutes thereafter." (Tr. 75). And "he has to maintain safe working conditions at all times." (Tr. 76).

Thus the Trial Court's Findings and Conclusion that Libelant was injured solely through his own failure to make adequate inspection of the engine room are fully supported by the evidence.

All the testimony in the case was in open court. As the Trial Court saw and heard the witnesses, its Findings should not be set aside unless clearly erroneous. *U. S. A. v. Wilhite*, 163 F. (2d) 825, (Ninth Circuit 1947), *Vileski v. Pacific Atlantic S.S. Co.*, 163 F. (2d) 553, 554 (Ninth Circuit 1947). And see the cases listed in the Appendix to *Petterson Lighterage & T. Corp. v. New York Central*, 126 F. (2d) 992 (Second Circuit 1942).

The present case is ruled by the doctrine that when it is the duty of libelant himself to maintain a safe place in which to work, he cannot recover for injuries resulting from his own failure to do so.

Asprodites v. Standard Fruit & Steamship Co., 108 F. (2d) 728 (Fifth Circuit 1940).

This was a suit brought under the Jones Act for the death of a ship's engineer who died from burns from an explosion of a steam pipe. The Court affirmed a directed verdict for defendant, and pointed out that deceased had been the engineer on duty at the time of the accident:

"As engineer, the deceased was charged with the duty to see that the boiler, steam pipes, manifold, and cut-off valves were properly operated, inspected, and cared for while he was on duty."

The Meteor, 1939 A.M.C. 367 (U. S. District Court, Western Dist. Wash.). Suit in admiralty for personal injuries sustained by engineer when he slipped on oily deck. The Court said:

"The court judicially knows that it was the duty of libelant, as engineer, to function in the interest of efficiency and safety for himself as well as for others; the court also knows that oil and grease are necessary in the performance of engineering duties, and necessarily must drop upon the floor of the department. It was the duty of the engineer to keep the department reasonably clear and clean of accumulation of oil, and to use such necessary agencies available—mats, canvas, etc.—if needed, in the interests of safety. His failure to do so, unless otherwise excused, may not be the basis for such claim as made." (citing cases).

Watterson v. U. S. A., 1934 A.M.C. 145 (U.S. District Court, Southern Dist. N. Y.). Cook slipped on greasy floor of galley. The Court said:

"In the second place, I cannot find any breach of duty on the part of the respondent or of its other employees, because even if the grease had been there for a day or two, it was clearly the duty of the libelant as well as that of anyone else to remedy this condition and to keep the floor clean."

Battice v. U. S. A., W. S. A., 79 Fed. Supp. 932, 1948 A.M.C. 1019 (U. S. District Court, Southern District, N. Y.). A recent case decided April 16, 1948. Chief steward, on going into icebox, was struck by a cake of ice which slid off top of a pile of ice. Recovery was denied. The Court said:

"It is clear to me that Battice failed to sustain his burden of proof on the claim of negligence. He was responsible for the proper stowage of the ice box, and the evidence makes it obvious that he completely controlled access to the box. Battice did not even pretend to know who was responsible for leaving ice in such condition that it could be disturbed by the motion of the ship. But the sole

responsibility for proper stowage was his, and it was his negligence that was the proximate cause of the accident. I do not accept his suggestion that perhaps a messman violated his instructions. Even had he sustained this guess by proof, which he did not, the fact would still remain that it was Battice's duty to see to it that the ice box was at all times a safe place in which to work, and his violation of his own duty was thus the proximate cause, and the only proximate cause, of the damage. Were it relevant I would, of course, find that the conduct of Battice in failing to take precautions for his safety when he saw the condition of the box (as he should have) was contributory negligence as a matter of law. But the question of contributory negligence does not arise since the carelessness of Battice, himself, was, as I have said, the only producing cause of the accident."

Cf. Vileski v. Pacific Atlantic S.S. Co., 163 F. (2d) 553 (Ninth Circuit 1947).

Appellant urges that the employer's duty to maintain a safe place to work is "non-delegable". That is of course true, in the sense that an employer cannot escape liability to employee A by showing that the duty had been delegated to employee B. But none of the cases cited by appellant involve the situation where the very employee whose duty it is to maintain a safe place to work is injured through his own failure to perform the duty. The distinction is clearly pointed out in *U. S. Steel Products Co. v. Noble*, 10 F. (2d) 89 (Second Circuit 1925).

That was also a suit by a third assistant engineer brought under the Jones Act. The Court said:

"As against another employee, the employer may not delegate the duty of keeping in reasonably safe

condition the essential appliances; but the employee charged with the very duty of so keeping them cannot make his own neglect of that duty the basis of a claim against his employer."

This point becomes most clear if we suppose that one of the oilers or firemen on Thurston's watch had fallen into the hole in the floor plates. In such a case, counsel for the seaman could argue most forcefully that the accident was due to the negligence of his superior officer, the engineer on duty, to properly inspect the engine room and maintain safe working conditions. But here, as Thurston himself was injured, he cannot recover for his own failure to do so.

We now comment on a few matters urged in Appellant's brief.

It is suggested that Thurston was too busy working on the generators, and didn't have time to make routine inspections of the engine room. But the Trial Court's finding is contrary. Edmonston testified that there was no hurry about the generators, and such work should not interfere with the duty to "make your routine round of inspections every thirty minutes" (Tr. 121-122). And Thurston in his testimony did not qualify his admissions that it was always his duty to inspect and make rounds of the engine room, and see that working conditions were safe (Tr. 23, 24, 26, 30). And he recognized this duty on the day he was hurt (Tr. 131, 132).

It is claimed that the engine-room floor was slippery from excessive oil and grease in the vicinity where the floor plate was removed (Appellant's Brief p. 16). But again the Trial Court's findings are contrary. Edmon-

ston, the Chief Engineer, testified positively that "The floor plates were clean", and "There was no excessive oil or grease". (Tr. 80). And on cross-examination "there was no oil or grease near there". (Tr. 118) Thurston's testimony is unconvincing. He first said the floor was greasy and he slipped (Tr. 7, 8). But at another point he doesn't mention slipping, but says "I just stepped around and he started getting the pump going good and I reached up to turn the water on deck and I *fell* in the bilge". (Tr. 18). He told the Public Health Service he "stepped into bilge" (Exhibit 4).

In any event, here again, if the floor plates *had* been *dangerously slippery*, it was Thurston's duty as engineer on watch to have the condition remedied. *The Meteor*, 1939 A.M.C. 367; *Watterson v. U. S. A.*, 1934 A.M.C. 145; *Battice v. U. S. A.*, 79 Fed. Supp. 932, 1948 A.M.C. 1019; *Asprodites v. Standard Fruit & S.S. Co.*, 108 F. (2d) 728; *Cf. Vileski v. Pacific-Atlantic*, 163 F. (2d) 553.

Appellant stresses the point that he was not warned in advance that there was to be a fire and boat drill that morning (Appellant's Brief p. 22). We believe the Court judicially knows that fire and boat drills are required by law to be held frequently at sea. The ship's engine room log, Exhibit 6, shows that fire and boat drill had previously been held on Thurston's watch, July 28-29. So there was nothing unusual about having such a drill at sea. But what good is a fire and boat drill if everyone is informed ahead of time when it is going to take place? Fires and emergencies don't usually give advance notice of their happening. The whole purpose

of fire and boat drills is defeated if the crew are advised ahead of time.

Point III

The award of \$56 for maintenance is based on a proper rate and period of disability.

The Trial Court awarded maintenance for 14 days (August 13 to August 26, 1946) at \$4 per day. Libelant claims a longer period and higher rate.

The Trial Court's finding of 14 days is fully supported by the evidence. Thurston was injured July 10. The injury consisted of broken ribs. Maintenance was allowed to a date more than six weeks after the injury. Thurston was well enough to stand his watches and do routine engine room work on the return voyage (See Log entries from July 23 to August 9 in Exhibit 6). He was declared fit for duty on August 26, 1946 by the U. S. Public Health Service doctors (Exhibits 8 and 9). The fractures were then well healed (Exhibit 4, 8). True, he did not take a permanent job at sea until he joined the SS FLYAWAY about November 24, 1946 (Tr. 11). But the reason he didn't work steadily during the interim was because there was a maritime strike from September 12 to November 23, 1946 (Tr. 126). No doctor told him not to work (Tr. 40), but he was advised by the Union not to work (Tr. 41). And he stood picket duty during the strike (Tr. 41, 42). Therefore, the Trial Court's finding that Libelant's disability extended to August 26, 1946 is fully supported.

As to rate of maintenance, Libelant furnished no proof of his living expenses. The Trial Court, handling numerous seamen's suits for maintenance, judicially knows the usual rates. The current rate for maintenance at the time of the injury, and during libelant's disability, as established by the U. S. Maritime Commission, was \$3.50 per day for unlicensed men, and from \$4.00 to \$6.00 a day for licensed men up to and including the Chief Engineer and Captain. Libelant was serving as third assistant engineer, and under these circumstances the Trial Court adopted the \$4 rate established by the U. S. Maritime Commission.

Libelant's testimony that the "contract rate of maintenance" is \$6 per day refers to what steamship companies, under contract with the Union, pay to seamen during the time they are employed on vessels while in port, but the vessel is not furnishing lodging and meals on board, and the seamen therefore have to go ashore for each meal (Tr. 17, 45). This is not the same as maintenance in the legal sense of the seaman's allowance for subsistence when because of illness or injury he has had to leave the service of the ship.

CONCLUSION

As libelant was the engineer on watch, and had been on watch for more than two hours before he was hurt, it was clearly his duty to inspect the engine room and see that the floor plates were in safe condition, not only

for himself, but for the oiler, fireman, and wipers also on duty under his supervision, and to maintain such safe conditions. He cannot recover damages resulting from his own failure to perform this duty. The Trial Court's Findings are fully supported by the evidence, and the Trial Court's decree should be affirmed.

Respectfully submitted,

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UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN H. AND COKE T. BRITE,

Appellants,

v.

THE PEOPLE OF THE STATE OF
CALIFORNIA, ROBERT A. HEINZE,
ET AL.,

Appellees.

BRIEF FOR APPELLEES

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FILE

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PAUL P. O'BRIEN,
CLERK



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No. 12265

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN H. AND COKE T. BRITE,

Appellants,

v.

THE PEOPLE OF THE STATE OF
CALIFORNIA, ROBERT A. HEINZE,
ET AL.,

Appellees.

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

The appellants herein filed a petition for the issuance of the writ of habeas corpus in the United States District Court for the Northern District of California, Northern Division. The Honorable Dal M. Lemmon, judge of said court, on February 11, 1949, issued an order to show cause as provided by United States Code, Title 28, Section 2243, directing the respondent to show cause why the writ should not be issued. Thereafter, on February 17, 1949, respondent filed a return to the order to show cause and motion to dismiss. A traverse to the return was filed, and following oral argument by respondent on March 21, 1949,

the petitioners filed with the court a closing brief in answer to respondent's oral argument, and the matter was submitted.

The court, on May 4, 1949, rendered and filed its written order denying petitioner's petition for the issuance of the writ.

ARGUMENT

I. The Procedure Followed by the District Court in Denying the Petition Without a Hearing Was Proper Under the Statutes

The first three points enumerated by the appellants as grounds for reversal may be grouped together and constitute an attack upon the procedure followed by the District Court in denying the petition without first granting a hearing and producing the petitioners in court.

The appellants have relied mainly upon the case of *Walker v. Johnston*, 312 U. S. 275, in support of their contention that the District Court was bound under the law to issue the writ for the purpose of holding a hearing on the alleged issues of fact raised by the petition. The *Walker* case has been cited on numerous occasions in support of the proposition of law which was therein decided, to wit, that where a petition for a writ of habeas corpus raises an issue of fact, the court to which the petition is addressed must produce the petitioner personally for a hearing on such issue of fact and make a determination thereon.

In view of the numerous occasions upon which the *Walker* case has been cited with approval on this

point the appellee cannot take issue with the basic principle of law thus stated. However, such is not to say that the rule is applicable to the present case. To do so assumes the basic question in issue, namely, whether the petition states facts which, if true, would entitle the petitioners to their release. It was the duty of the District Court to determine preliminarily as a matter of law whether the petition and the return to the order to show cause raised such an issue of fact. In this connection, the decision in the *Walker* case specifically recognizes that in some instances the court to which the petition is addressed is empowered to make such preliminary determination without a hearing and to decline to issue the writ. This may be done immediately upon the filing of the petition or following a return to an order to show cause. The Supreme Court in thus deciding stated as follows:

“It will be observed that if, upon the face of the petition, it appears that the party is not entitled to the writ, the court may refuse to issue it. Since the allegations of such petitions are often inconclusive, the practice has grown up of issuing an order to show cause, which the respondent may answer. By this procedure the facts on which the opposing parties rely may be exhibited, and the court may find that no issue of fact is involved. In this way useless grant of the writ with consequent production of the prisoner and of witnesses may be avoided where from undisputed facts or from incontrovertible facts, such as those recited in a court record, it appears, as matter of law, no cause for granting the writ exists. On the other hand, on

the facts admitted, it may appear that, as matter of law, the prisoner is entitled to the writ and to a discharge. This practice has long been followed by this court and by the lower courts. It is a convenient one, deprives the petitioner of no substantial right, if the petition and traverse are treated, as we think they should be, as together constituting the application for the writ, and the return to the rule as setting up the facts thought to warrant its denial, and if issues of fact emerging from the pleadings are tried as required by the statute.”

In the later case of *Dorsey v. Gill*, 148 F. 2d 857, (cert. denied, 325 U. S. 890) the United States Court of Appeals for the District of Columbia, examined at great length the office and nature of a writ of habeas corpus and the procedure to be followed in federal courts upon an application therefor. The lengthy opinion is exhaustively annotated with a great number of cases including the *Walker* case. In summarizing the procedure which might be followed by a district court on a petition for the issuance of a writ of habeas corpus, that court stated as follows (pp. 865-866):

“There are at least ten such possible alternatives, as follows: (1) When a petition is presented to a judge with a request for leave to file it, the judge may, if the petitioner is not entitled to a writ, deny leave to file it; or (2) he may, in the interest of justice—if the petition is insufficient in substance—require petitioner to amend it; or he may require him to show—if the judge is not otherwise informed—whether petitioner has made a prior application and, if so, what action was had on it;

(3) he may issue a rule to show cause why leave to file a petition for writ of habeas corpus should not be granted and upon the return, may grant or deny leave to file; (4) after a petition has been filed, if it satisfies the requirements of the statute, the judge should issue the writ forthwith; (5) if, upon consideration of a petition which has been filed, it appears that the petitioner is not entitled to the writ, the court should refuse to issue it; (6) if the allegations of the petition are inconclusive, the judge may issue a rule to show cause why a writ should not be granted, to which the relator may respond; (7) if the procedure suggested in (6) is followed, the facts on which the opposing parties rely having been exhibited to the judge, he may find that no issue of fact or law is involved and may then refuse to grant the writ, in which event it is not necessary to hold a hearing; (8) on the other hand, if the procedure suggested in (6) is followed, the judge may find that the facts admitted—in response to the order to show cause—entitled the petitioner to the writ and to a discharge, forthwith, as a matter of law; or (9) he may find that an issue is involved; in which event he should grant the writ and require a hearing, the petition and traverse being then treated as, together, constituting the application for the writ, the return to the rule as setting up the facts thought to warrant its denial, and the issues of fact, thus emerging, should be tried as required by that statute; (10) if, as a matter of convenience, the judge—without determining whether the petition is sufficient—issues the writ, he may then, upon the return, hear and dispose of the whole matter at once.”

The procedure suggested under number (7) was precisely the procedure which was followed by the Honorable Judge Dal M. Lemmon in the instant matter.

In commenting upon the abuse of the writ of habeas corpus and the necessity of the court to which a petition is addressed of determining preliminarily whether justice is to be served by the issuance of the writ, the court in *Dorsey v. Gill*, 148 F. 2d 857, stated at pp. 862-863:

“Today, in the District of Columbia, we find a similar contrast. Here, petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriage of justice, but also as a device for harrassing court, custodial and enforcement officers with a multiplicity of repetitions, meritless requests for relief. The most extreme example is that of a person who, between July 1939 and April 1944, presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions, a third 24, a fourth 22, a fifth 20. One hundred nineteen persons have presented 597 petitions—an average of 5. * * * The number has increased most rapidly during the last three years, since the Supreme Court’s decision in *Walker v. Johnston*, and since one of the opinions filed in this Court in the *Rosier* case, admonished the District Court that: ‘Administrative inconvenience, even occasional abuse of the facilities of the courts, is but a small price to pay for the previous right of access to the courts guaranteed under our system of government *to all who claim to be wronged.*’ (Italics supplied.) Thus,

if all petitions presented during this period of three and one-third years had been filed and writs issued, as is the practice in some districts, the judges of the District Court would have been required to hold 815 hearings upon returns made, in each instance, by the custodial officers in whose control these persons were held.”

It is clear, therefore, that so far as the procedure followed in the present case is concerned, the same was entirely in conformity with the rules laid down in the cases cited by appellants, and more particularly, in the later case of *Dorsey v. Gill*, 148 F. 2d 857, to which the attention of this court is especially directed for a full and complete discussion of the procedure on habeas corpus.

See, also:

Zahn v. Hudspeth, 102 F. (2d) 759 (cert. denied, 307 U. S. 642).

The sole question remaining, therefore, is as follows: Does the petition in the present case state facts which, if true, would entitle the petitioners to their release?

II. The Allegation In the Petition That No Proof of Pre-meditation Necessary to Sustain a Finding of Guilt to Murder In the First Degree was Offered by Respondent State, Was Insufficient As a Ground for the Issuance of a Writ

The opinion and order of the District Court (Record on Appeal, pp. 98 to 107), and the cases therein cited would seem to adequately dispose of this question. As pointed out by the Honorable Judge Dal

M. Lemmon in his opinion, the appellants appealed from the original judgment of conviction, which judgment was affirmed by the Supreme Court of California (*People v. Brite*, 9 Cal. 2d 666). That court specifically considered the question of the sufficiency of the evidence with respect to proof of the essential elements for first degree murder under the law of the State of California. After a complete review of the evidence and the circumstances surrounding the killing of the three men, the Supreme Court of California concluded that there was ample evidence to support the judgment in this respect (9 Cal. 2d 666, at p. 679).

It, therefore, follows without possible contradiction, that the state court did specifically consider and rule upon this contention of appellants that there was no evidence of premeditation or the other necessary elements of murder in the first degree. This point having been presented to and specifically passed upon by the state court, the federal court is bound by the rule that it will not reexamine such question and permit the writ of habeas corpus to serve as a second appeal on the merits.

Frank v. Mangum, 237 U. S. 309, 35 S. Ct. 582,
59 L. Ed. 969;

Mart v. Lainsou, 169 F. 2d 1016.

In the recent case of *Telfian v. Sanford*, 161 F. 2d 556 (cert. denied, 332 U. S. 781; rehearing denied, 335 U. S. 864), the Circuit Court of Appeals in affirming a judgment dismissing a petition for writ of habeas

corpus, disposed of the matter in one very short paragraph, stating as follows:

“A writ of habeas corpus cannot try the sufficiency of the evidence to support a judgment of conviction. The district judge was right in dismissing the application. His judgment is affirmed.”

It is submitted that the contention of the appellants herein, insofar as it rests on the allegations of the petition that the evidence was insufficient to support a judgment of conviction of murder in the first degree, may be disposed of by this court in like manner.

III. There Was No Error In the Holding of the District Court That Petitioners Suffered No Injury From the Alleged Fact That the Prosecution Failed to Produce Evidence Which May Have Been Favorable to the Defendants

The evidence which the appellants claim was suppressed by the prosecution consisted of the speculative testimony of one B. F. Decker. An affidavit of Mr. Decker was attached to the petition (Petitioners' Exhibit No. 1, Record on Appeal, pp. 27-28). In such affidavit Mr. Decker states that he was interviewed in the district attorney's office prior to the trial; that he told the district attorney that he would not testify as was suggested to him, but would testify to the truth. Thereafter, he was not called as a witness.

It is readily apparent that the mere failure to call a particular witness does not amount to the suppression of evidence. The prosecution is not required to call all persons as witnesses who may have knowledge

of the prosecution in question. There is no showing in the affidavit that this particular witness was not available to testify for the defense or that the prosecution prevented him from so testifying. It is not even indicated that the defense was unaware of the fact that he had knowledge of the shootings.

The point thus raised is shown to be one which concerns a possible discovery of new evidence following the trial and in no way concerns appellants' right to due process of law.

It is well settled that to secure release on habeas corpus one must conclusively show that perjured testimony was willfully and knowingly used by the prosecution to secure a conviction.

Mooney v. Holohan, 294 U. S. 103;

Casebeer v. Hudspeth, 121 F. 2d 914;

Wagner v. Hunter, 161 F. 2d 601, (cert. denied, 332 U. S. 776).

The mere allegation that the prosecution failed to call as a witness one whose testimony was not favorable to the prosecution's case does not show a deliberate use of perjured testimony or even the suppression of testimony.

Kelly v. Ragen, 129 F. 2d 811.

IV. The District Court Correctly Ruled That the Petition Failed to State Facts Showing That the Trial Was Not Conducted Fairly, But Under the Influence of Mob Threatening

The District Court had before it in the instant case not only the petition proper, but also certain exhibits

filed therewith and in support of the petition. Viewing the petition as a whole, as including all of the exhibits attached thereto, the District Court was justified in concluding that from the whole thereof no sufficient showing was made indicating that the trial court lost jurisdiction due to mob hysteria and threatening during the course of the trial, and that petitioners were, therefore, deprived of their liberty without due process of law. In this connection, further language from the case of *Dorsey v. Gill*, 148 F. 2d 857, is particularly apropos. The court therein stated, as follows (p. 870):

“It is apparent, therefore, that the words of the statute—from *the petition itself*—include information, available to the judge by judicial notice, to which the allegations of the petition refer, or upon which [sic] they depend; it is the duty of the judge to look through the petition, to the record, in order that he may discover such information; having done so, the exercise of sound judicial discretion may require that the petition be dismissed or leave to file it denied. In fact, this power and duty of the judge extends not only to the records of his own court, but to those of other courts as well.”

The District Court in the present case took notice of the fact that the California Supreme Court in deciding this case on appeal from the original judgment reviewed evidence relative to the high state of feeling in the county during the time of the trial and concluded that “The trial was conducted with commend-

able fairness.” *People v. Brite*, 9 Cal. 2d 666, at pp. 689-90.) The Supreme Court of the State of California, immediately following the trial of the case some 13 years ago, was, as stated by Judge Lemmon, in a better position to properly determine the possible effect of outside influences upon the course of the trial. This contention appearing in the petition and upon this appeal is subject also to the fatal criticism that the point has been fully considered by the state courts.

The meager allegations on this point and attempted support thereof in the exhibits attached to the petition bring into operation the oft stated rule that “the power conferred on a federal court to issue a writ of habeas corpus to inquire into the cause of the detention of any person asserting that he is being held in custody by the authority of a state court in violation of the Constitution, laws or treaties of the United States, is not unqualified, but is to be exerted in the exercise of a sound discretion. The due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist.” (*Boyd v. O’Grady*, 121 F. 146, 147, and cases therein cited.)

It is submitted that the District Court properly exercised its discretion in concluding that this is not one of those “rare cases where exceptional circumstances of peculiar urgency are shown to exist.”

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court dismissing the writ should be affirmed.

Dated, Sacramento, California, September 6, 1949.

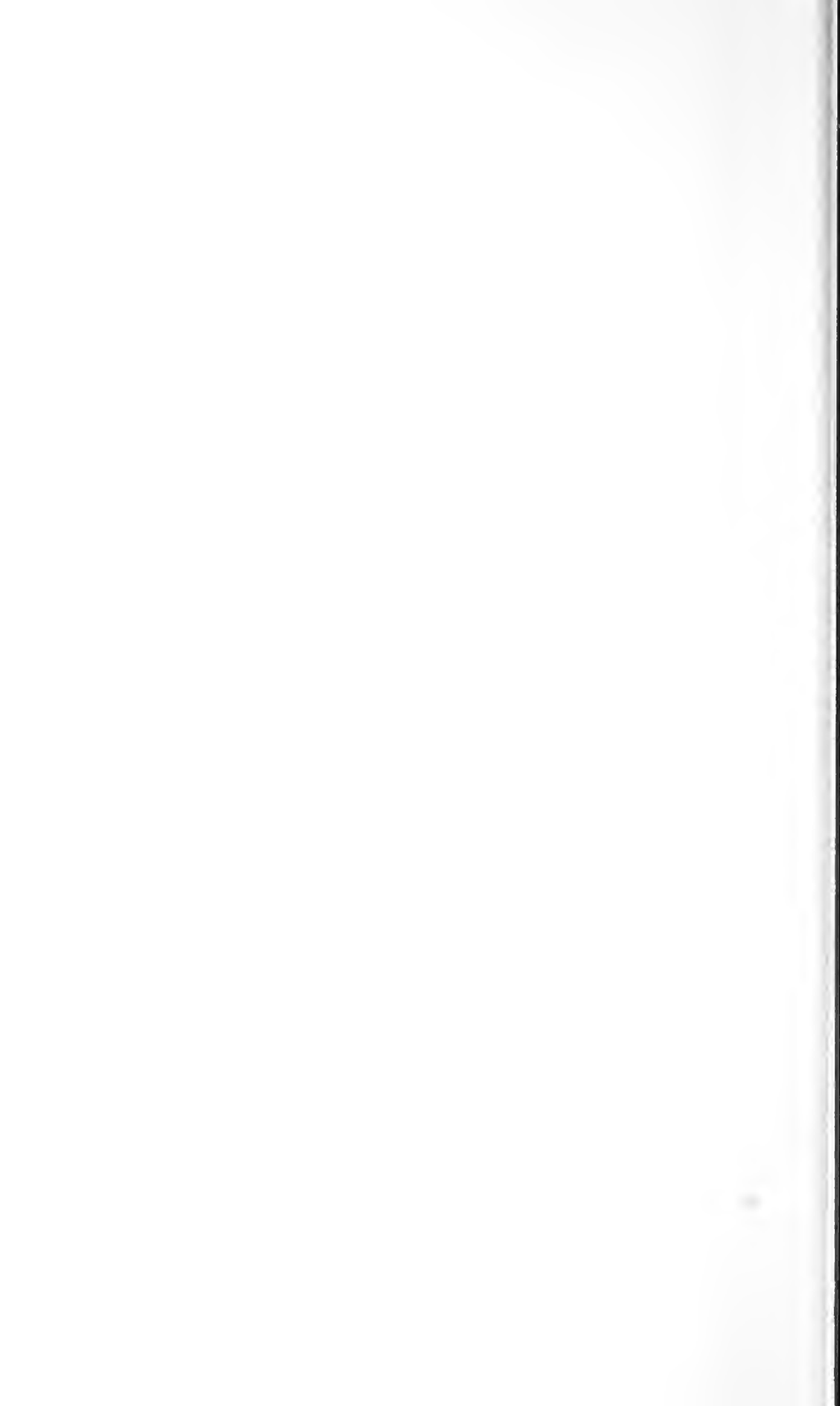
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State of California

Attorneys for Appellees



12266

United States
Court of Appeals
For the Ninth Circuit.

W. P. JEAGER, Officer in Charge of Immigration
and Naturalization Service in Tucson, Arizona,
Appellant,

vs.

MOSES D. SIMRANY,
Appellee.

Transcript of Record

Upon Appeal from the United States District Court
for the District of Arizona.

AUG - 5 1949

PAUL P. O'BRIEN,
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12266

United States
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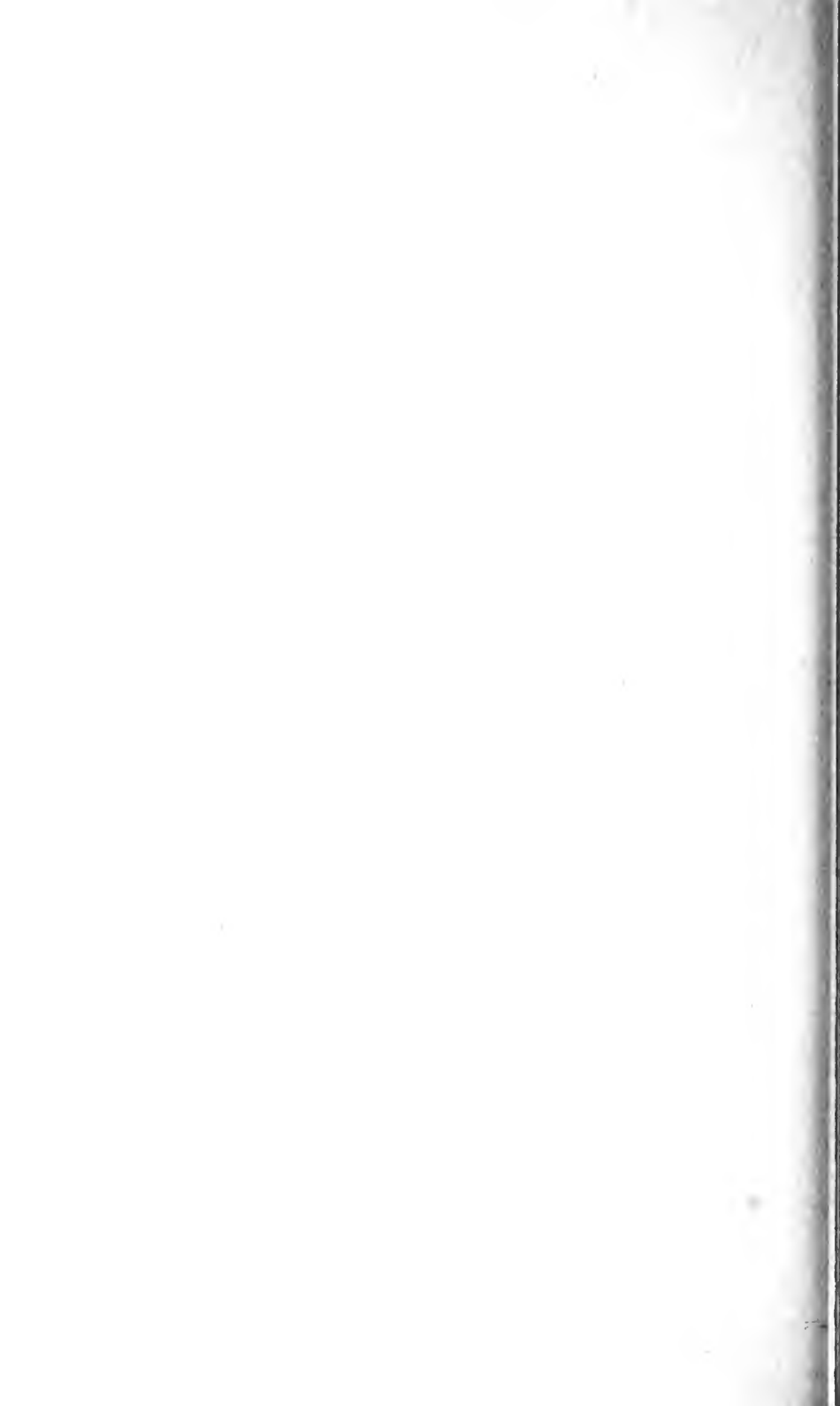
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States
in and for the District of Arizona

Civ. 450—Tuc.

MOSES D. SIMRANY,

Plaintiff,

vs.

W. P. JEAGER, Officer in Charge of Immigration
and Naturalization Service in Tucson, Arizona,
Defendant.

AMENDED COMPLAINT

Comes now the plaintiff herein and for cause of
action alleges:

I.

Jurisdiction of these proceedings is conferred upon this Court by the provisions of Title 28, U. S. Code, Section 2201; Title 8, U. S. Code, Section 701 (a); Title 28, U. S. Code, Section 1331; and is for a declaratory judgment to establish the right of the plaintiff to retain, without molestation, a certificate of lawful entry and to restrain the defendant from cancelling or attempting to cancel all records of registry and certificate of lawful entry issued to the plaintiff pursuant to the provisions of Title 8, U. S. Code, Section 728. The value of the matter in controversy exceeds the sum or value of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

II.

That the plaintiff is a resident of the District of

Arizona, in the City of Tucson, County of Pima, State of Arizona; that the plaintiff is married and that the plaintiff's wife is a citizen of the United States; and that the plaintiff has been a resident of the County of Pima, State of Arizona, for more than one year last past.

That the defendant, W. P. Jeager, is the Officer in charge of the business and affairs of the Office of Immigration and Naturalization located in Tucson, Arizona.

III.

That pursuant to the provisions of Title 8, U. S. Code, Section 728, the plaintiff did apply for registry as an alien in the United States prior to July 1, 1924, with respect to whom there was no record of arrival, and on April 17, 1941, after due hearing, the Commissioner of Immigration and Naturalization did make a record of registry pursuant to the provisions of said Title 8, U. S. Code, Section 728, and did issue to the plaintiff a certificate of lawful entry, No. 155838.

IV.

That the plaintiff is now qualified to file with the District Court of the United States for the District of Arizona, a petition for admission to citizenship of the United States and now desires to file with the Immigration and Naturalization Service, an application for a certificate of arrival as prescribed by Title 8, U. S. Code, Section 729, to enable him to file said petition of Naturalization pursuant to the provisions of Title 28, U. S. Code, Section 732.

V.

That the Commissioner of Immigration and Naturalization has adopted what is referred to as Part 385, Title 8, of Federal Regulations; that by the provisions of said Part 385, the Commissioner has undertaken to specify the procedure to be followed in what he refers to as a proceeding for cancellation; that the defendant pursuant to the provision of said Part 385 is now threatening to cancel said record of registry and to revoke said certificate of lawful entry, and is claiming a right to effect such revocation pursuant to the provisions of Title 8, U. S. Code, Section 740, and the provisions of said Part 385; and said defendant is alleging that said record of registry and certificate of lawful entry were procured by false statements, and has ordered this plaintiff to appear before him and show cause why said record of registry and certificate of lawful entry should not be revoked.

VI.

That neither Title 8, U. S. Code, Section 740, nor any other provision of law confers upon the Commissioner of Immigration and Naturalization authority to adopt the provisions of said Part 385, Title 8, of Federal Regulations for cancellation of said record of registry and certificate of lawful entry, nor upon said defendant the authority to cancel said record of registry and revoke said certificate of lawful entry, and the defendant's attempts to conduct the proceeding to cancel said record of registry and revoke said certificate of lawful entry are in excess of his statutory jurisdiction, author-

ity or right, and will deprive the plaintiff of his statutory right to have his petition for naturalization passed upon by a Court.

VII.

That there is no procedure for review of the defendant's action in said cancellation and revocation proceedings and should said defendant revoke said record of registry and cancel said certificate of lawful entry, this plaintiff will have no adequate remedy at law for such unlawful action.

Wherefore, plaintiff prays this Court to enter its decree declaring that:

1. The defendant has no right under any law of the United States to cancel the record of registry and to revoke the certificate of lawful entry heretofore made and issued to this plaintiff.

2. The defendant be restrained from proceeding with what defendant characterizes as a revocation or cancellation proceeding pursuant to the provisions of Part 385 of Title 8 of the Code of Federal Regulations.

/s/ NOLEN L. McLEAN,

/s/ EDWARD W. SCRUGGS,

Attorneys for Plaintiff.

State of Arizona,
County of Pima—ss.

Moses D. Simrany, being first duly sworn, deposes and says:

That he has read the foregoing Complaint and

knows the contents thereof, and all matters of fact therein stated are true.

/s/ MOSES D. SIMRANY.

Subscribed and sworn to before me this 19th day of October, 1948, by Moses D. Simrany.

[Seal] /s/ NOLEN L. McLEAN,
Notary Public.

My Commission expires 3/20/50.

Copy received this 21st day of October, 1948.

/s/ F. E. FLYNN,
U. S. Attorney.

[Endorsed]: Filed Oct. 21, 1948.

[Title of District Court and Cause.]

MOTION TO DISMISS

Now comes the defendant W. P. Jaeger, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona, by the United States Attorney in and for the District of Arizona and moves the Court to dismiss the Amended Complaint filed herein for the reasons that:

1. The Complaint fails to state a claim against the defendant upon which relief can be granted for the reason that this Officer is merely the servant conducting proceedings for superior officers having the power to decide.

2. The Complaint should be dismissed for the

reason that it pleads no actual controversy between the plaintiff and this defendant.

F. E. FLYNN,
U. S. Attorney.

/s/ DON HUMMEL,
Assistant U. S. Attorney,
Attorney for Defendant.

Memorandum of Points and Authorities

1. The defendant W. P. Jaeger, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona, is not a proper party as the defendant is not empowered to cancel the record of registry or to revoke the certificate of lawful entry.

8 U. S. C. 728 (a) (b) (c) 729(a)
8 C. F. R. Part 385

2. This action is premature as no actual controversy exists.

28 U. S. C. 400, as amended.

Macauley vs. Waterman S S Corporation,
327 U. S. 540.

Myers vs. Bethlehem Shipbuilding Corp.,
303 U. S. 36.

Wettre vs. Hague,
74 F. Supp. 396.

Received copy this 1 day of Nov., 1948.

/s/ EDWARD W. SCRUGGS,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 1, 1948.

[Title of District Court and Cause.]

MEMORANDUM OF AUTHORITY IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Comes now the plaintiff and in opposition to the defendant's Motion to Dismiss, directs the Court's attention to the following authority,

W. H. Neher v. A. E. Harwood,
(128 F. (2d) 846), 158 A.L.R. 1116,

in which the United States Circuit Court of Appeals, Ninth Circuit, held that when a superior officer was without authority to act at all, so that his direction to a subordinate is of no validity, his joinder is unnecessary. By reference to the amended complaint filed herein the applicability of this holding will become apparent.

NOLEN McLEAN,
SCRUGGS & BUTTERFIELD.

By /s/ EDWARD W. SCRUGGS,
Attorneys for Plaintiff.

Copy received this 18th day of November, 1948.

/s/ F. E. FLYNN,
U. S. Attorney.

[Endorsed]: Filed Nov. 18, 1948.

[Title of District Court and Cause.]

SUPPLEMENTAL MEMORANDUM

It is the plaintiff's understanding from the observations of the Court at the hearing on the defendant's motion to dismiss the amended complaint, that the Court accepts the proposition of law in the case of *Neher vs. Harwood*, cited by the plaintiff at the argument, but that the Court is of the opinion that the plaintiff, in the instant case, has failed to show where he plaintiff will receive any relief or benefit by either injunction or declaratory judgment prayed for in the amended complaint. On this premise, the Court read the complaint, setting out only the allegations with respect to the actions of the defendant sought to be restrained, stating:

“* * * That the defendant, W. P. Jeager, is the Officer in charge of the business and affairs of the Office of Immigration and Naturalization located in Tucson, Arizona * * *

“That the defendant, pursuant to the provisions of said Part 385, is now threatening to cancel said record of registry and to revoke said Certificate of Lawful Entry and is claiming a right to effect such revocation * * * and has ordered the plaintiff to appear before him and show cause why said record of registry and Certificate of Lawful Entry should not be revoked * * *”

and the Court then pointed out that the Commissioner of Immigration is the only officer capable of performing those acts.

From the foregoing, the Court noted that the defendant is charged by the plaintiff with seeking to revoke the record of registry and Certificate of Lawful Entry. The defendant contends that only the Commissioner of Immigration and Naturalization could revoke such a certificate and cited the statute under which this proceeding is brought. The position of the plaintiff is that even the Commissioner of Immigration and Naturalization has no such power. The section of the statute cited by the defendant as the basis for the cancellation proceeding does not confer power upon the Commissioner to do anything except as is set up in that statute. The record of registry and Certificate of Lawful Entry are not such documents as may be cancelled. If the Court will consider Title 8, U.S.C., Section 740, in connection with the rest of the Nationality Act, the Court will observe that citizenship in all but a few instances is granted by a Court and jurisdiction to grant citizenship is conferred upon courts of record, Title 8, U.S.C., Section 701. Certificates of naturalization are to be issued by the clerk of the Court conferring the citizenship. Certain certificates of citizenship which have nothing to do with naturalization in the main, but only with exceptional cases, are permitted to be issued by the Commissioner of Immigration and Naturalization, Title 8, U.S.C., Section 739; 1002. Revocation of naturalization is covered by Title 8, U.S.C., Section 738, and provides for a Court cancelling a certificate. The plaintiff is in the position of charg-

ing that the defendant is taking an act to revoke a record of registry. He seeks to have the defendant restrained from proceeding in any way to effect such revocation. For the government to say that only the Commissioner can do so is to beg the issue. The Commissioner by his regulations has set up that he may do so in Part 385 referred to in the complaint, but his authority to set up Part 385 under which the defendant is acting upon is not extant.

However, if the Court is of the same view as was indicated at the hearing, the plaintiff now requests leave to amend his complaint by adding to Paragraph V thereof the following allegations:

“That the defendant is acting pursuant to the provisions of Title 5 U.S.C., Section 1004, in conducting a proceeding to cancel the plaintiff’s record of registry and Certificate of Lawful Entry, in that said defendant has been designated under said section to conduct a hearing which is an essential part of such cancellation proceeding; that in the event that said defendant is allowed to proceed with said hearing, said record of registry and Certificate of Lawful Entry may be cancelled; that if said Certificate is cancelled the plaintiff will be irreparably damaged in that he will be deprived of his right to obtain the certificate of arrival required by Title 8, U.S.C., Section 732-(c) to be filed with a petition for naturalization and which must be obtained by the plaintiff before he can file such a petition; that by preventing the plaintiff from filing such a petition for naturalization, he will be de-

prived of his right to have a Court pass upon his qualifications for citizenship."

And the plaintiff further asks to be allowed to amend his prayer for relief by asking in addition to the matter heretofore prayed for the following allegations:

"3. That the defendant be restrained from conducting any hearing as a part of any proceeding to revoke his the plaintiff's record of registry and Certificate of Lawful Entry.

4. That the Court declare that the defendant has no right under any law of the United States to conduct a hearing as a part of a proceeding to cancel the plaintiff's record of registry and Certificate of lawful entry."

The Court will notice from the foregoing that the defendant in concert with the Commissioner is seeking to do an unlawful act in a lawful manner. This is one of the things that the world is now confronted with everywhere; that is the sham which the communists use when they seize a government. They do not seize the government openly as an aggressor, but instead use their procedural machinery as authority to do acts which normally are considered beyond the power of government. That is what the defendant is seeking to do here. If the plaintiff can restrain the procedure, he can defeat the exercise of the unlawful act. It is true the Court may say "Restraining this officer may not give you complete relief for another may be designated to con-

duct the hearing.” In answer to this the plaintiff will necessarily be forced to bring another restraining order against such other. However, the cancellation proceeding, as it is charged, will be conducted always in a lawful manner with respect to procedure to effect the exercise of the unlawful ultimate act, for the Commission nor the defendant has not yet urged that he is not to be governed by the procedure required by Title 5 U.S.C., Section 1001, et. seq., and particularly Title 5 U.S.C., Section 1004.

NOLEN McLEAN,
EDWARD W. SCRUGGS.

By /s/ EDWARD W. SCRUGGS,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 8, 1949.

[Title of District Court and Cause.]

DEFENDANT'S REPLY BRIEF

Applicable Statutes and Regulations

The original application by Moses D. Simrany, plaintiff herein for a certificate of lawful entry, is based on the provisions of the Nationality Act of 1940, 8 U.S.C. 728(a). The revelant portions are as follows:

1. Section 328(a):

“The Commissioner shall cause to be made for

use in complying with the requirements of this chapter a registry of each person arriving in the United States * * *."

2. Section 328(b):

"Registry of aliens at ports of entry, required by subsection A of this section, may be made as to any alien, not ineligible to citizenship, in whose case there is no record of admission for permanent residence, if such alien shall make a satisfactory showing to the Commissioner in accordance with regulations prescribed by the Commissioner with the approval of the Attorney General that such alien:

(3) is a person of good moral character."

3. Section 328(c):

Upon making of such record of registry the alien in question

"* * * shall be deemed to be lawfully admitted to the United States for permanent residence as of the date of such entry."

4. Section 329(a):

"The certificate of arrival required by this chapter may be issued upon application to the Commissioner in accordance with regulations prescribed by the Commissioner with the approval of the Attorney General upon the making of a record of registry, as authorized by Section 328 of this Act."

5. Section 740:

"The Commissioner is authorized to cancel any certificate of citizenship or any copy of a declara-

tion of intention or certificate of naturalization heretofore or hereafter issued by the Commissioner, or Deputy Commissioner, if it would appear to the Commissioner's satisfaction that such document was illegally or fraudulently obtained from the Commissioner or Deputy Commissioner."

Pursuant to the authority cited above the Commissioner of Immigration, with the approval of the Attorney General, issued regulations providing for the procedure to be followed in the administration of this Act, 8 Code of Federal Regulations:

1. Part 362—Registry of Aliens under Nationality Act of 1940.

A. Par. 362.7 Facts Essential to be Established. "It must be established to the satisfaction of the Commissioner of Immigration and Naturalization * * * (e) that he is a person of good moral character * * *."

B. Par. 362.11 Authorization or Denial; procedure thereafter. "If the Commissioner of Immigration and Naturalization is satisfied from the record and accompanying documents that the applicant is entitled to registry, an order to that effect will be entered on Form N-130." "* * * If the Commissioner of Immigration and Naturalization is not satisfied from the record and accompanying documents that the applicant is entitled to registry the application shall be denied and the head of the District wherein the application was filed advised of the action."

2. Part 385—Revocation of Records Created and of Naturalization and Citizenship Documents issued by the Commissioner:

A. 385.1 Report and Notice. "If at any time after certification of lawful entry has been issued, under part 362 of this chapter, or a certificate of naturalization has been issued, under part 378 * * * evidence becomes available indicating that such record or document was obtained illegally or fraudulently complete report shall be promptly submitted to the Central Office or the appropriate Director with comment and recommendation; if the Commissioner or Deputy Commissioner is satisfied that a prima facie showing has been made that such record or document was obtained illegally or fraudulently he shall cause such District Director to have served * * * notice * * * that proceeding has been instituted to cancel the record or document * * *."

B. 385.2 Answer. * * * Upon receipt of such response or answer or upon expiration of time allowed for showing good cause the record shall be closed and forwarded to the Commissioner accompanied by findings of fact, conclusions of law and the recommendation of the official assigned * * * together with comment and recommendation of the District Director."

C. 385.3 If the Commissioner finds the record or document, or both, were procured illegally or through fraud he shall cancel ab initio such record or document or both.

This action by the plaintiff is pursued under the

provisions of the Declaratory Judgment Statute, 28 U.S.C. 2201, which provides the following:

“In case of actual controversy within its jurisdiction, except with respect to Federal taxes. Any Court of the United States upon the filing of an appropriate pleading will declare the rights and other legal regulations of any interested party seeking such declaration whether or not further relief is, or could be, sought. Any such declaration shall have the force and effect of a final judgment or a decree and shall be reviewable as such.”

It is apparent from an examination of the provisions of applicable statutes, quoted above, that plaintiff's case is improperly taken for the reasons:

1. The officer in charge is not a proper party defendant. An examination of the provisions of the Nationality Act of 1940, as set out above, in each instance grants the power of action to the Commissioner. The only authority granted the officer in charge is to conduct a hearing, make recommendations and forward the file to the Commissioner for action. It therefore follows that the orders of this Court directed to the officer in charge, the defendant herein, would accomplish nothing. An order of this Court restraining the officer in charge from proceeding with the hearing would not prevent the Commissioner of Immigration from refusing to grant the certificate required by the plaintiff in his Petition for Citizenship. It is apparent that the Commissioner of Immigration is an indispensable party. The plaintiff apparently perceived this

as his original pleadings named the Commissioner of Immigration as a party defendant.

2. The action taken is premature because no actual controversy exists, as required by the Declaratory Judgment Act, 28 U.S.C. 2201. It has long been settled that a person who seeks in a Court action to question an administrative proceeding must first exhaust his administrative remedies.

Macauley vs. Waterman S. S. Corp.,
327 U.S. 540;

Myers vs. Bethlehem Shipbuilding Corp.,
303 U.S. 36;

Wettre vs. Hague,
74 Fed. Supp. 396.

3. The Commissioner has the statutory authority to revoke a certificate of lawful entry and to make regulations governing the procedure to be followed in revocation.

It is the opinion of the defendant that sufficient power of revocation is vested in the Commissioner by the foregoing statute. The Certificate of Lawful Entry is merely one document in the procedure provided to acquire citizenship status. The statute quoted above (8 U.S.C. 740) should be given a reasonable interpretation and not strained to limit its application to a specific enumerated document, rather than all documents which go to make up the citizenship record.

The plaintiff has also objected to the legality of the regulations issued by the Commissioner, the rele-

vant portions of which are set out above. While it is not believed necessary in this action to argue the merits or the right of the Commissioner to make these regulations for the reason that the proper parties are not before the Court the statute specifically gives the Commissioner authority to make regulations

8 U.S.C. 328(b), 329(a)

and reasonable regulations issued by the Commissioner have the force and effect of law.

United States vs. Smull,

236 U.S. 405;

Rosen vs. United States,

245 U.S. 467;

Haff vs. Shee,

63 Fed. 2d 191.

In summary it is defendant's position that plaintiff's action must fail for the following reasons:

1. The Commissioner of Immigration is an indispensable party and not within the jurisdiction of this Court.

2. The defendant officer in charge is not a proper party as his functions are merely ministerial.

3. The Declaratory Judgment Act is not available as no actual controversy exists until plaintiff has exhausted his administrative remedies.

4. The Commissioner of Immigration has adequate statutory authority to

- (a) make regulations providing for the revocation of a certificate of lawful entry;
- (b) revoke the certificate of lawful entry.

F. E. FLYNN,

U. S. Attorney for the
District of Arizona.

/s/ DON HUMMEL,

Assistant U. S. Attorney,
Attorney for Defendant.

Received copy this 14th day of January, 1949.

/s/ EDWARD W. SCRUGGS,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 14, 1949.

[Title of District Court and Cause.]

PLAINTIFF'S REPLY BRIEF

The defendant has quoted at length the statutes which he asserts apply to support his motion. He argues that because the Commissioner of Immigration has power to prescribe regulations to carry out the provisions of the Nationality Act, that power carries with it authority to provide the regulations referred to in this proceeding as Part 385. He ignores the fact that Part 385 goes beyond the purview of the act. The history of administrative bodies is one of construing the rule-making power beyond the purport of acts conferring it. The at-

tempt has been made so often that courts have had occasions frequently to pass upon the power and have always held that unless the rule is to carry out some purpose of the act the rule is ineffective; hence, for Part 385 to be effective the act itself must confer the power which the regulations are designed to make operative. Hence, the necessity of determining whether or not the act confers upon the Commissioner of Immigration the power to do anything looking toward the cancellation of a record of registry and certificates of lawful entry. The defendant attempts to justify Part 385 with this language:

“The Certificate of Lawful Entry is merely one document in the procedure provided to acquire citizenship status. The statute quoted should be given a reasonable interpretation and not strained to limit its application to a specific enumerated document, rather than all documents which go to make the citizenship record.”

The defendant ignores the fact that naturalization proceeding insofar as this plaintiff is concerned is a court matter, as would be any attempt to cancel the certificate of citizenship of the plaintiff. To follow the defendant's reasoning to its ultimate conclusion is to say that even though the plaintiff may have had United States citizenship conferred upon him, the defendant could under Part 385 revoke and set aside the record of registry and certificate of lawful entry and ignore completely the fact that cancellation of the plaintiff's citizenship would es-

sentially have to be conducted and obtained through a court proceeding.

The defendant further contends in his brief that under the Declaratory Judgment Act a person seeking a declaratory judgment must first exhaust his administrative remedies. That would be true perhaps were the action taken to review or declare a judgment with reference to matters which were within the power of the officers acting. Where the power is claimed unlawfully and the administrative regulation is beyond the power of the officers the Declaratory Judgment is proper. In this instance, Part 385 is subject to a declaratory judgment with respect to the defendant who is acting under it. Part 385 is a rule of the type referred to in Title 5, Section 1003. There is no administrative procedure to be exhausted with respect to the validity of Part 385. The contention of the plaintiff is simply that the defendant is acting legally as to procedure, but illegally as to his right to act at all. His entire act being illegal and without authority, the plaintiff is entitled to a restraining order and a judgment so declaring.

NOLEN McLEAN,
EDWARD W. SCRUGGS,

By /s/ EDWARD W. SCRUGGS,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 17, 1949.

[Title of District Court and Cause.]

MEMORANDUM

Plaintiff in his amended complaint states that he is an alien who arrived in the United States prior to July 1, 1924, but no record was made of his arrival; that he applied for registry of arrival in the United States pursuant to the provisions of Section 728(b), Title 8, United States Code, and on April 17, 1941, after due hearing, the Commissioner of Immigration and Naturalization made a record of registry and issued to plaintiff a certificate of lawful entry, No. 155838; that the defendant is now threatening to cancel said record of registry and revoke said certificate of lawful entry, on the ground that said record of registry and said certificate were procured by false statements, and has ordered plaintiff to appear before him and show cause why said record of registry and certificate should not be revoked.

Plaintiff prays for the entry of a decree by the court declaring that defendant has no right to cancel the record of registry or to revoke the certificate of lawful entry heretofore made and issued to plaintiff and that he be restrained "from proceeding with what defendant characterizes as a revocation or cancellation proceeding pursuant to the provisions of part 385 of Title 8 of the Code of Federal Regulations." Defendant has moved to dismiss. The present defendant is not authorized by law to cancel the record of registry or revoke the certificate of

lawful entry, but it appears from the allegations of the original complaint, the amended complaint and the statements of counsel in their briefs and oral argument, that the Commissioner has directed defendant to conduct a hearing to determine whether the registry of lawful entry was procured by fraud; and if the Commissioner concludes from the evidence taken that it was so procured he will cancel the record of registry and revoke the certificate. Such action would be seriously harmful to plaintiff. If, as plaintiff contends, the Commissioner is not authorized by law to cancel the registry and revoke the certificate, I think plaintiff is entitled to an injunction restraining the hearing, provided the court may, in a proceeding to which the Commissioner is not a party, grant such relief. Two questions therefore are presented for determination, first, whether the Commissioner has lawful authority to cancel the record and revoke the certificate and, second, if he has not, whether in this proceeding to which he is not a party the court may enjoin the defendant, a subordinate officer, from carrying out the order of the Commissioner to hold a hearing.

First: The Nationality Act of 1940, Title 8, United States Code, provides, Section 728, that in cases of aliens who arrived in the United States prior to 1924 and as to whom there is no record of entry for permanent residence the Commissioner of Immigration and Naturalization upon a proper showing as to the actual entry of the alien prior to July 1, 1924, that he has resided continuously in

the United States since such entry and that he is a person of good moral character and not subject to deportation, may make an entry of registry of the entrance of such person and the time and place thereof; and upon the making of such record of registry the alien shall be deemed, for the purpose of naturalization to have been lawfully admitted to the United States for permanent residence as of the date of such entry.

The Act further provides (Sec. 740) that the Commissioner may cancel any certificate of citizenship or any copy of a declaration of intention or certificate of naturalization theretofore or thereafter issued by the Commissioner if it shall appear to the Commissioner's satisfaction that such document was illegally or fraudulently obtained.

It will be noted that the Act does not in terms authorize the Commissioner to cancel records of arrival or certificates of lawful entry. Counsel for the Government contend that power to do so may be implied from the authority specifically granted. I do not think so. In *Stark v. Wickard*, 321 U. S. 288, 309, the court said:

“When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of these agencies is circumscribed by the authority granted.”

See also *Arrow-Hart & H. Co. v. Commissioner*, 291 U. S. 587, 598. As express authority was by Congress limited to cancellation of certificates of citizenship, copies of declarations of intention to

become citizens, and certificates of naturalization, the Commissioner is not authorized to cancel the registry or certificate mentioned in the complaint.

Second: May the court in this proceeding wherein the Commissioner is not a party, enjoin the hearing before Jaeger as officer in charge of Immigration and Naturalization Service in Tucson? The problem of when a court may issue an injunction to restrain the acts of a subordinate administrative official if the superior whose orders the subordinate is about to carry into effect is not a party, was presented to the Circuit Court of Appeals of this Circuit in *Neher vs. Harwood*, 128 F(2d) 846. The court found in reviewing the decisions that there had been much confusion in the Federal Courts on this question and it made a thorough examination of the facts in and the holdings of the courts in a great number of the cases in which the question had been presented, and came to the conclusion that where the complaint is that the superior officer is abusing a discretion legally vested in him he is a necessary party to the action, but where it is charged and the question for determination is whether the order of the superior is beyond his authority, the superior is not a necessary party. That is the situation here. The motion to dismiss will be denied. An order accordingly will be entered Monday, February 14, 1949, at 10 o'clock a.m.

/s/ HOLLY,
Judge.

[Endorsed]: Filed Feb. 9, 1949.

In the District Court of the United States in
and for the District of Arizona

No. Civil 450—Tucson

MOSES D. SIMRANY,

Plaintiff,

vs.

W. P. JEAGER, Officer in Charge of Immigration
and Naturalization Service in Tucson, Arizona,
Defendant.

JUDGMENT

This matter having come on regularly before the court on a motion to dismiss filed by the defendant and directed to the plaintiff's amended complaint, and the court having ruled thereon and denied said motion, and the attorney for the defendant having appeared in open court and announced that the defendant will stand upon his motion to dismiss and will take no further action in these proceedings and declined to file an answer herein; and the plaintiff having moved orally for judgment on the pleadings and the record and the court being fully advised in the premises, does find:

1. That the plaintiff is a resident of the District of Arizona, City of Tucson, County of Pima, State of Arizona, and has been a resident thereof for more than one year last past; that the defendant, W. P. Jeager, is the officer in charge of the business

and affairs of the Office of Immigration and Naturalization, located in Tucson, Arizona.

2. That pursuant to the provisions of Title 8, U. S. Code, Section 728, the plaintiff did apply for registry as an alien in the United States prior to July 1, 1924, with respect to whom there was no record of arrival, and on April 17, 1941, after due hearing, the Commissioner of Immigration and Naturalization did make a record of registry pursuant to the provisions of said Title 8, U. S. Code, Section 728 and did issue to the plaintiff a certificate of lawful entry, No. 155838.

3. That the plaintiff is now qualified to file with the District Court of the United States for the District of Arizona, a petition for admission to citizenship of the United States and now desires to file with the Immigration and Naturalization Service, an application for a certificate of arrival as prescribed by Title 8, U. S. Code, Section 729, to enable him to file said petition of Naturalization pursuant to the provisions of Title 28, U. S. Code, Section 732.

4. That the Commission of Immigration and Naturalization has adopted what is referred to as Part 385, Title 8 of Federal Regulations; that by the provisions of said Part 385, the Commissioner has undertaken to specify the procedure to be followed in what he refers to as a proceeding for cancellation; that the defendant pursuant to the provisions of said Part 385 is now threatening to cancel said record of registry and to revoke said certificate

of lawful entry, and is claiming a right to effect such revocation pursuant to the provisions of Title 8, U. S. Code, Section 740 and the provisions of said Part 385; and said defendant is alleging that said record of registry and certificate of lawful entry were procured by false statements, and has ordered this plaintiff to appear before him and show cause why said record of registry and certificate of lawful entry should not be revoked. That the defendant is acting pursuant to the provisions of Title 5, U. S. C., Section 1004 in conducting a proceeding to cancel the plaintiff's record of registry and certificate of lawful entry, in that said defendant has been designated under said section to conduct a hearing which is an essential part of such cancellation proceeding; that in the event that said defendant is allowed to proceed with said hearing, said record of registry and certificate of lawful entry may be cancelled; that if said certificate is cancelled the plaintiff will be irreparably damaged in that he will be deprived of his right to obtain the certificate of arrival required by Title 8, U. S. C., Section 732-(c) to be filed with a petition for naturalization and which must be obtained by the plaintiff before he can file such a petition; that by preventing the plaintiff from filing such a petition for naturalization, he will be deprived of his right to have a Court pass upon his qualifications for citizenship.

5. That neither Title 8, U. S. Code, Section 740 nor any other provision of law confers upon the

Commissioner of Immigration and Naturalization authority to adopt the provisions of said Part 385, Title 8 of Federal Regulations for cancellation of said record of registry and certificate of lawful entry, nor upon said defendant the authority to cancel said record of registry and revoke said certificate of lawful entry, and the defendant's attempts to conduct the proceeding to cancel said record of registry and revoke said certificate of lawful entry are in excess of his statutory jurisdiction, authority or right, and will deprive the plaintiff of his statutory right to have his petition for naturalization passed upon by a Court.

Wherefore, It Is Ordered, Adjudged and Decreed:

That the Commissioner of Immigration and Naturalization has no lawful authority to cancel the record of registry and certificate of lawful entry issued to the plaintiff, pursuant to the provisions of Title 8, U. S. Code, Section 728;

That the defendant as the officer in charge of the Immigration and Naturalization Service in Tucson, Arizona, has no lawful authority to conduct a hearing as a party of any proceeding to cancel a record of arrival and certificate of lawful entry issued to the plaintiff, pursuant to the provisions of Title 8, U. S. Code, Section 728:

That the defendant be and he is restrained from conducting any hearing as a part of any proceeding to revoke the record of registry and certificate

of lawful entry made with respect to the plaintiff, pursuant to the provisions of Title 8, U. S. Code, Section 728.

Dated at Tucson, Arizona, this 18th day of March, 1949.

/s/ HOLLY.

Approved as to form:

/s/ DON HUMMEL,

Assistant U. S. Attorney.

[Endorsed]: Filed and entered in Civil Docket March 18, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that W. P. Jaeger, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona, defendant herein, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the judgment entered herein on the 18th day of March, 1949, denying defendant's motion to dismiss plaintiff's amended complaint, the entering of the order restraining defendant from conducting a hearing as part of a proceeding to revoke the record of registry and certificate of lawful entry and the decision that the Commissioner

of Immigration and Naturalization has no authority to cancel the record of registry and certificate of lawful entry.

F. E. FLYNN,
U. S. Attorney.

/s/ DON HUMMEL,
Assistant U. S. Attorney,
Attorneys for Defendant.

Copies of the above notice mailed this 13th day of May, 1949, to Nolen McLean and Edward W. Scruggs, attorneys for plaintiff.

[Endorsed]: Filed May 13, 1949.

[Title of District Court and Cause.]

STIPULATION AS TO RECORD

It is hereby stipulated that the record and proceedings to be included in the record of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the United States District Court of Arizona, in the above-entitled matter are as follows:

- (a) Amended Complaint;
- (b) Defendant's Motion to Dismiss;
- (c) Plaintiff's Memorandum of Authority in Opposition to Defendant's Motion to Dismiss;
- (d) Plaintiff's Supplemental Memorandum;
- (e) Defendant's Reply Brief;

- (f) Plaintiff's Reply Brief;
- (g) Court's Memorandum;
- (h) Judgment;
- (i) Notice of Appeal;
- (j) This Stipulation.

F. E. FLYNN,
U. S. Attorney,

/s/ DON HUMMEL,
Assistant U. S. Attorney,
Attorney for Appellant.

SCRUGGS & BUTTERFIELD,

By /s/ EDWARD W. SCRUGGS,
Attorneys for Appellee.

[Endorsed]: Filed May 26, 1949.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD
ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Moses D. Simrany, Plaintiff, versus W. J. Jaeger, Officer in Charge of Immigration and Naturalization Service

in Tucson, Arizona, Defendant, numbered Civ-450 Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case and designated in the Stipulation As To Record filed therein and made a part of the record attached hereto, and the same are as follows, to-wit:

- (a) Amended Complaint;
- (b) Defendant's Motion to Dismiss;
- (c) Plaintiff's Memorandum of Authority in Opposition to Defendant's Motion to Dismiss;
- (d) Plaintiff's Supplemental Memorandum;
- (e) Defendant's Reply Brief;
- (f) Plaintiff's Reply Brief;
- (g) Court's Memorandum;
- (h) Judgment;
- (i) Notice of Appeal;
- (j) Stipulation as to Record.

Witness my hand and the seal of said Court at Tucson, Arizona, this 9th day of June, 1949.

WM. H. LOVELESS,
Clerk,

[Seal] By /s/ CATHERINE A. DOUGHERTY
Chief Deputy Clerk.

[Endorsed]: No. 12266 United States Court of Appeals for the Ninth Circuit. W. P. Jeager, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona, Appellant, vs. Moses

D. Simrany, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed June 13, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals,
Ninth Circuit

No. 12266

W. P. JAEGER, Officer in Charge of Immigration
and Naturalization Service in Tucson, Arizona,
Appellant,

vs.

MOSES D. SIMRANY,

Appellee.

APPELLANT'S STATEMENT OF POINTS

Now comes the United States of America by Frank E. Flynn, United States Attorney for the District of Arizona, and Don Hummel, Assistant United States Attorney, and presents the following statements of points on which appellant intends to rely on appeal, to-wit:

1. The District Court erred in concluding as a matter of law that the Nationality Act of 1940 did

not authorize the Commissioner of Immigration to cancel records of registry or certificates of lawful entry.

2. The District Court erred in making a ruling with respect to the authority of the Commissioner of Immigration to cancel the record of registry and certificate of lawful entry when the Commissioner was not a party to this suit and not within the jurisdiction of this Court.

3. The District Court erred in ruling that the defendant Officer in Charge of Immigration and Naturalization Service has no lawful authority to conduct a hearing as a party of any proceedings to cancel the record of registry and certificate of lawful entry issued to plaintiff and in restraining defendant from conducting such a hearing.

4. The District Court erred in denying defendant's Motion to Dismiss plaintiff's Amended Complaint.

FRANK E. FLYNN,
U. S. Attorney for the
District of Arizona,

/s/ DON HUMMEL,
Assistant U. S. Attorney.

Copy received this 20th day of June, 1949.

/s/ EDWARD W. SCRUGGS,
Attorney for Moses B. Simrany.

[Endorsed]: Filed and Docketed June 20, 1949.

United States of America,
District of Arizona—ss.

I hereby certify that the foregoing is the original
of Appellant's Statement of Points filed in Case
No. Civ-450 Tucson, on June 20, 1949.

[Seal] /s/ WM. H. LOVELESS,
Clerk of the U. S. District Court, District of
Arizona.



No. 12266

IN THE
UNITED STATES COURT OF APPEALS
For The Ninth Circuit

W. P. JEAGER, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona,	} <i>Appellant,</i>
vs.	
MOSES D. SIMRANY,	} <i>Appellee.</i>

Upon Appeal from the United States District Court
for the District of Arizona.

BRIEF FOR THE APPELLANT

FRANK E. FLYNN,
*United States Attorney for the
District of Arizona.*

DON HUMMEL,
Assistant U. S. Attorney.

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IN THE
UNITED STATES COURT OF APPEALS
For The Ninth Circuit

W. P. JEAGER, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona,	}	<i>Appellant,</i>
vs.		
MOSES D. SIMRANY,	}	<i>Appellee.</i>

Upon Appeal from the United States District Court
for the District of Arizona.

BRIEF FOR THE APPELLANT

JURISDICTION

This appeal involves a suit instituted against W. P. Jeager, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona. The amended complaint was filed October 21, 1948.

The appellee, an alien, arrived in the United States prior to July 1, 1924. No record was made of his arrival, so he applied for registry of arrival in the United States pursuant to the provisions of Section 728(b),

Title 8 U.S.C.A. Upon this application a record of registry was entered and a certificate of lawful entry was issued to appellee.

Claiming that the certificate of lawful entry and record of registry were procured by false statements, the appellant ordered appellee to appear before him and show cause why said record of registry and certificate of lawful entry should not be cancelled (Plaintiff's complaint, T.R. 4). This action on the part of appellant was pursuant to the procedure specified by the Commissioner of Immigration and Naturalization under authority of Part 385 of Title 8 C.F.R. and Section 740, Title 8 U.S.C.A. (T.R. 4).

The complaint, after setting out the above facts, prays for a decree:

1. That the defendant has no right under any law of the United States to cancel the record of registry and to revoke the certificate of lawful entry; and
2. That the defendant be restrained from proceeding with a revocation or cancellation proceeding pursuant to the provisions of Part 385 of Title 8 C.F.R. (T.R. 5).

The appellant interposed a motion to dismiss the complaint on the ground that no controversy existed between the parties, and that the superior officer, namely, the Commissioner of Immigration and Naturalization (in this brief hereinafter referred to as Commissioner), having power to decide, was a necessary party (T.R. 6). The motion to dismiss was denied February 9, 1949 (T.R. 26), and judgment was entered March 18, 1949, restraining the appellant from conducting any hearing as a part of any proceeding to revoke the record of registry and certificate of lawful entry (T.R. 31).

Notice of appeal was timely filed May 13, 1949, pursuant to the provisions of Section 2107, Title 28 U.S.C.A. (T.R. 32). This Court has jurisdiction by virtue of the provisions of Section 1291, Title 28 U.S.C.A.

QUESTIONS PRESENTED

1. Whether the defendant is a proper party defendant and whether the Commissioner of Immigration and Naturalization is a necessary party defendant.
2. Whether the Commissioner of Immigration and Naturalization has authority to cancel records of registry or certificates of lawful entry.
3. Whether the plaintiff is entitled to the relief asked for in the amended complaint and granted by the Court, without first exhausting his administrative remedies.

STATUTES INVOLVED

Title 8 U.S.C.A., Section 728 (a) [Section 328 (a) of the Nationality Act of 1940], provides that:

“The Commissioner shall cause to be made, for use in complying with requirements of this subchapter, a registry of each person arriving in the United States * * *.”

Title 8 U.S.C.A., Section 728 (b), directs:

“Registry of aliens at ports of entry required by subsection (a) of this section may be made as to any alien not ineligible to citizenship in whose case there is no record of admission for permanent residence, if such alien shall make a satisfactory showing to the Commissioner, in accordance with regulations prescribed by the Commissioner, with the approval of the Attorney General, that such alien—

- (1) Entered the United States prior to July 1, 1924;
- (2) Has resided in the United States continuously since such entry;
- (3) Is a person of good moral character; and
- (4) Is not subject to deportation."

Title 8 U.S.C.A., Section 728 (c), directs that upon the making of such a record of registry, the alien in question

"shall be deemed to have been lawfully admitted to the United States for permanent residence as of the date of such alien's entry."

Title 8 U.S.C.A., Section 729(a), provides that:

"The certificate of arrival required by this subchapter may be issued upon application to the Commissioner in accordance with regulations prescribed by the Commissioner, with the approval of the Attorney General, upon the making of a record of registry as authorized by Section 728 of this Act."

Title 8 U.S.C.A., Section 727(b), provides that:

"The Commissioner, with the approval of the Attorney General, shall make such rules and regulations as may be necessary to carry into effect the provisions of this subchapter and is authorized to prescribe the scope and nature of the examination of petitioners for naturalization * * *."

Part 362, Title 8 C.F.R., is a regulation issued under the authority of Sections 458, 727, 728 and 742 of Title 8 U.S.C.A., authorizing the procedure for carrying out the provisions of Section 728(b), Title 8 U.S.C.A.

Part 385 of Title 8 C.F.R. is a regulation issued by the Commissioner authorizing the hearings for the

revocation of records and of naturalization and citizenship documents issued by the Commissioner, and particularly covers record of registry and certificate of lawful entry.

STATEMENT

We believe that the statement in this brief under "JURISDICTION" contains a statement of all facts necessary for a determination of this appeal. We will, however, briefly summarize them.

Appellee, an alien, entered the United States prior to July 1, 1924. No record was made of his arrival.

Upon application, the Commissioner made a record of registry and issued a certificate of lawful entry pursuant to Section 728(b), Title 8 U.S.C.A.

The Commissioner, claiming that the record of registry and certificate of lawful entry were obtained by false representation, directed the appellant to conduct a hearing, and the appellant, pursuant to such directions, ordered the appellee to appear before him and show cause why the record of registry and certificate of lawful entry should not be revoked.

Appellee sought by this action to restrain appellant from proceeding with such hearing.

Appellant's motion to dismiss the amended complaint was denied (T.R. 26).

Judgment was entered restraining appellant from conducting any hearing as a part of any procedure to revoke the record of registry and the certificate of lawful entry (T.R. 31).

STATEMENT OF POINTS TO BE URGED

The appellant relies upon the following errors as a basis for this appeal (T.R. 35, 36):

1. The District Court erred in concluding as a matter of law that the Nationality Act of 1940 did not authorize the Commissioner of Immigration to cancel records of registry or certificates of lawful entry.

2. The District Court erred in making a ruling with respect to the authority of the Commissioner of Immigration to cancel the record of registry and certificate of lawful entry when the Commissioner was not a party to this suit and not within the jurisdiction of this Court.

3. The District Court erred in ruling that the appellant Officer in Charge of Immigration and Naturalization Service has no lawful authority to conduct a hearing as a part of any proceedings to cancel the record of registry and certificate of lawful entry issued to appellee and in restraining appellant from conducting such a hearing.

4. The District Court erred in denying appellant's Motion to Dismiss appellee's amended complaint.

ARGUMENT

All of the assigned errors are based on the right of the Commissioner to direct the appellant to hold the hearing. If he had the right to direct the holding of such a hearing, he necessarily would have the right to cancel the record of registry and certificate of lawful entry and would be a necessary party.

To determine the issues on this appeal we must assume that the record of registry and certificate of

lawful entry were procured by false statements. Appellee's complaint states that that is the ground upon which appellant was threatening to proceed with the hearing (T.R. 4).

Under the statutory provisions which have been quoted, only the Commissioner is authorized to grant an application for registry, to issue a certificate of lawful entry, and to issue a certificate of arrival. The regulations empower the Commissioner to cancel such documents which have been fraudulently obtained.

8 *C.F.R.* 385.1, 385.3.

The Officer in Charge merely is authorized to serve the notice inaugurating the administrative proceeding, to receive the respondent's answer, to conduct a hearing, and to make recommendations to the Commissioner.

8 *C.F.R.* 385.1, 385.2, 385.3.

The action is premature because appellee has not exhausted his administrative remedies. It has long been the settled law that a person who seeks in a court action to question an administrative proceeding must first exhaust his administrative remedies.

Macauley v. Waterman S.S. Corp.,
327 U.S. 540, at 544.

Myers v. Bethlehem Shipbuilding Corp.,
303 U.S. 41.

Wettre v. Hague, 74 Fed. Sup. 396.

Appellee has made no attempt to exhaust his administrative remedies and it follows from the authorities cited that his suit was prematurely brought. The court below had no jurisdiction under Section 2201, Title

28 U.S.C.A., the Declaratory Judgment Act, because there was no actual controversy between the parties, and there can be no actual controversy until the administrative proceeding is completed and a determination adverse to the appellee is made. Appellee contended in the court below that in the event the Commissioner ruled against him and cancelled his certificate of lawful entry, he would have no redress as the regulation makes no provision for a review of the Commissioner's action. For that reason appellee contends that he would suffer irreparable injury, which would justify the intervention by a court at this time. As a matter of fact, he has not suffered any damage of any kind or any injury at this time. In case of an adverse ruling by the Commissioner and an attempt to deport the appellee, he then would have the right to sue out a writ of habeas corpus, and in the event he makes application for citizenship he could then challenge the action of the Commissioner. There is, therefore, no necessity for any determination of his rights at this time.

In the case of *Macauley v. Waterman S.S. Corp.*, supra, the district court dismissed the complaint on the ground that respondent had failed to exhaust its administrative remedies. The Court of Appeals reversed, and the Supreme Court reversed the Court of Appeals. We quote from page 545 of the opinion:

"The district court had no power to determine in this proceeding and at this time issues that might arise because of these future contingencies."

The appellee has not questioned the proposition of law that a superior who has the right and authority to make the decision is a necessary party; nor does appellee question the proposition of law that under such circumstances the appellee must first exhaust his administrative remedies.

Appellee contended in the court below, however, that the statutes do not give the Commissioner power to revoke the record of registry or the certificate of lawful entry; nor does it give him the power to issue the regulation (Part 385, Title 8 C.F.R.), and that there is no administrative procedure to be exhausted with respect to the validity of Part 385 (T.R. 22).

The Commissioner is authorized to issue the registry and certificate upon a showing, among other things, that the applicant "is a person of good moral character" (Section 728(b), Title 8 U.S.C.A.). The certificate of arrival may be issued in accordance with *regulations prescribed by the Commissioner* (Section 729(a), Title 8 U.S.C.A.).

The certificate is issued by the Commissioner administratively, and it seems reasonable to assume that it can be revoked administratively. The regulation involved in this case is certainly a reasonable one. Its purpose is to provide the means to right a wrong where a fraud has been perpetrated upon the Government.

It seems inconceivable that Congress intended to sanction the perpetration of frauds. To say that the Commissioner has no authority to strip from the wrongdoer the benefits which were never rightfully his is to put a premium on frauds against the Government, and would place the practitioners of fraud in an invulnerable position once their fraudulent design had been completed. Fraud may vitiate any transaction. That principle definitely applies where the fraud is practiced against the Government.

United States v. Bell Telephone Co.
128 U.S. 315.

In the case just cited it was claimed that the Government was without remedy to revoke a patent obtained through fraud. In discussing this matter the court said:

“It assumes that the government, which has thus been imposed upon and deceived, is utterly helpless, and that it can take no steps to correct the evil or to redress the fraud. If such a fraud were practised upon an individual, he would have a remedy in any court having jurisdiction to correct frauds and mistakes and to relieve against accident; but it is said that the government of the United States—the representative of sixty millions of people, acting for them, on their behalf, and under their authority—can have no remedy against a fraud which affects them all, and whose influence may be unlimited.”

Similar observations have been made with relation to proceedings to revoke naturalization certificates obtained through fraud.

Knauer v. United States, 328 U.S. 654.

Johannessen v. United States, 225 U. S. 227.

In the latter case the court quotes from Chief Justice Parker in *Foster v. Essex Bank*, 16 Mass. 273:

“There is no such thing as a vested right to do wrong.”

It is true that the foregoing cases involve judicial proceedings to vacate documents obtained through fraud, but the proceedings were judicial in such cases only because that was the method of attack chartered by statute. In the present case there is no statutory direction that court proceedings be instituted. Therefore, we must rely on the regulations as a necessary and proper method of providing means for annulling certificates obtained by fraud.

In line with the foregoing reasoning, we call the Court's attention to the only reported decision on the point involved.

Dopico v. Revell, 73 Fed. (2d) 221.

In the above case, as in this, a certificate of registry was issued to an applicant. Subsequently it was discovered that he induced the issuance of the certificate through fraudulent concealment of a criminal record. An administrative proceeding to revoke the certificate of registry was had, and upon the evidence presented, the Commissioner directed that the certificate be cancelled. Thereafter deportation was ordered. The alien brought habeas corpus proceedings, claiming that the Commissioner had exceeded his authority in attempting to cancel his certificate of registry. The court proceeding was unsuccessful and the appellate court, in its opinion, said:

“The sole question involved here is whether the certificate of registry was lawfully cancelled. . . In considering the legality of the cancellation the court below was limited in its inquiry as to whether, after a fair hearing, the determination of facts by the department was supported by substantial evidence and whether the law was correctly applied . . . A study of the record shows conclusively that there was substantial evidence upon which the determination as to the cancellation of the certificate of registry was based and the action of the judge below in dismissing the petition for the writ of habeas corpus was proper and is accordingly affirmed.”

In the case just quoted from, the authority of the Commissioner was challenged, and his acts were upheld by the court. The fact that the case was heard and determined by the court on its merits supports the Government's argument in this case to the effect that the

action was premature and that the appellee has, and at the proper time will have, an adequate remedy at law.

CONCLUSION

We respectfully submit that:

1. Regulation Part 385, Title 8 C.F.R., is a valid and reasonable regulation. It does not conflict with any statutory provisions and represents a consistent administrative interpretation which should not be disturbed unless clearly wrong.

Brewster v. Gage, 280 U. S. 327.

Constanzo v. Tillinghast, 287 U. S. 341-345.

2. Under the regulation, and impliedly under the statutes cited, the Commissioner was authorized to direct appellant to conduct the proceedings for the cancellation of the certificate of lawful entry.

3. The Commissioner is a necessary party.

4. The action is premature because appellee has not exhausted his administrative remedies.

5. The appellee has an adequate remedy at law.

6. The motion to dismiss the complaint should have been granted and the judgment of the District Court should be reversed.

Respectfully submitted,

FRANK E. FLYNN,
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District of Arizona.*

DON HUMMEL,
Assistant U. S. Attorney.
Attorneys for Appellant.

No. 12266

IN THE
UNITED STATES COURT OF APPEALS
For the Ninth Circuit

W. P. JAEGER, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona,	}	<i>Appellant,</i>
vs.		
MOSES D. SIMRANY,		
		<i>Appellee.</i>

Upon Appeal from the United States District Court
for the District of Arizona.

BRIEF FOR THE APPELLEE

SCRUGGS AND BUTTERFIELD
Edward W. Scruggs
A. E. Butterfield
NOLEN L. McLEAN



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W. P. JEAGER, Officer in Charge of
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vs.

MOSES D. SIMRANY,

Appellee.

Upon Appeal from the United States District Court
for the District of Arizona

BRIEF FOR THE APPELLEE

JURISDICTION

This appeal involves a suit instituted against W. P. Jeager, Officer in Charge of Immigration and Naturalization Service in Tucson, Arizona. The amended complaint was filed October 21, 1948.

The appellee has brought his action in the District Court pursuant to the provisions of Title 28 U.S.C.A., Section 2201 and Title 28 U.S.C.A., Section 131 and Titles U.S.C.A., Section 1009, and seeks a declaratory

judgment to establish the right of the appellee to retain without molestation a certificate of lawful entry and to restrain the appellant from cancelling or attempting to cancel the record of registry and certificate of lawful entry issued to the appellee pursuant to the provisions of Title 8 U.S.C.A., Section 728. The value of the matter in controversy exceeds the sum or value of \$3,000.00, exclusive of interests and costs.

Neither Title 8 U.S.C.A., Section 740 nor any other provisions of law confer upon the Commissioner of Immigration and Naturalization authority to adopt the provisions of Part 385, Title 8 of the Code of Federal Regulations for cancellation of a record of registry and a certificate of lawful entry, nor upon the appellant the authority to cancel said record of registry and revoke said certificate of lawful entry or do any act or thing in connection with the cancellation thereof.

There is no procedure for administrative review of the appellant's action in promulgating a regulation referred to as Part 385, Title 8 of the Code of Federal Regulations, which regulation is unlawful and beyond the power of the Commissioner of Immigration and Naturalization to adopt insofar as said regulation applies to a record of registry and certificate of lawful entry.

The appellee, an alien, arrived in the United States prior to July 1, 1924. No record was made of his arrival, so he applied for registry of arrival in the United States pursuant to the provisions of Section 728(b), Title 8 U.S.C.A. Upon this application a record of registry was entered and a certificate of

lawful entry was issued to appellee on April 17, 1941.

Claiming that the certificate of lawful entry and record of registry were procured by false statements, the appellant ordered appellee to appear before him and show cause why said record of registry and certificate of lawful entry should not be cancelled (Plaintiff's complaint, T.R. 4). This action on the part of appellant was pursuant to the procedure specified by the Commissioner of Immigration and Naturalization under authority of Part 385 of Title 8 C.F.R. and Section 740, Title 8 U.S.C.A. (T.R. 4).

The appellant is acting pursuant to the provisions of Title 5 U.S.C.A., Section 1004 and conducting a proceeding to cancel appellee's record of registry and certificate of lawful entry, and has been designated under said section to conduct the hearing which is an essential part of such cancellation proceeding; in the event that the appellant is allowed to proceed with said hearing, said record of registry and certificate of lawful entry may be cancelled; that if said certificate is cancelled the appellee will be irreparably damaged in that he will be deprived of his right to obtain the certificate of arrival required by Title 8 U.S.C.A., Section 732(c), to be filed with a petition for naturalization and which must be obtained by the appellee before he can file such a petition; that by preventing the appellee from filing such a petition for naturalization he will be deprived of his right to have the court pass upon his qualifications for citizenship.

The amended complaint and the proffered amendments thereto appearing in the transcript at pages 11 and 12 and recognized by the trial judge in his

opinion and judgment, after setting out the above facts, prays for a decree:

1. That the defendant has no right under any law of the United States to cancel the record of registry and to revoke the certificate of lawful entry; and

2. That the defendant be restrained from proceeding with a revocation or cancellation proceeding pursuant to the provisions of Part 385 of Title 8 C.F.R. (T.R. 5); and

3. That the defendant be restrained from conducting any hearing as a part of any proceeding to revoke the plaintiff's record of registry and Certificate of Lawful Entry; and

4. That the Court declare that the defendant has no right under any law of the United States to conduct a hearing as a part of a proceeding to cancel the plaintiff's record of registry and Certificate of Lawful Entry.

The appellant interposed a motion to dismiss the complaint on the ground that no controversy existed between the parties, and that the superior officer, namely, the Commissioner of Immigration and Naturalization (in this brief hereinafter referred to as Commissioner), having power to decide, was a necessary party (T.R. 6). The motion to dismiss was denied February 9, 1949 (T.R. 26), in a written memorandum opinion by the trial judge (T.R. 23) and judgment was entered March 18, 1949, restraining the appellant from conducting any hearing as a part of any proceeding to revoke the record of registry and certificate of lawful entry (T.R. 31).

Notice of appeal was timely filed May 13, 1949, pursuant to the provisions of Section 2107, Title 28 U.S.C.A. (T.R. 32). This Court has jurisdiction by virtue of the provisions of Section 1291, Title 28 U.S.C.A.

STATUTES INVOLVED

Title 8 U.S.C.A., Section 210 (a)(b), provides that:

“Any alien about to depart temporarily from the United States may make application to the Commissioner of Immigration and Naturalization for a permit to reenter the United States, stating the length of his intended absence, and the reasons therefor. Such application shall be made under oath, and shall be in such form and contain such information as may be by regulations prescribed, and shall be accompanied by two copies of the applicant's photograph.”

“If the Commissioner of Immigration and Naturalization finds that the alien has been legally admitted to the United States, and that the application is made in good faith, he shall, with the approval of the Secretary of Labor, issue the permit, specifying therein the length of time, not exceeding one year, during which it shall be valid. The permit shall be in such form as shall be by regulations prescribed and shall have permanently attached thereto the photograph of the alien to whom issued, together with such other matter as may be deemed necessary for the complete identification of the alien.”

Title 8 U.S.C.A., Section 155, provides that:

“At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law . . . shall, upon the warrant of the Secretary of Labor, be taken into custody and deported. . .”

Title 8 U.S.C.A., Section 214, provides that:

“Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this subchapter to enter the United States, or to have remained therein for a longer time than permitted under this subchapter or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in section 155 and 156 of this title. . .”

Title 8 U.S.C.A., Section 727 (b), provides that:

“The commissioner, with the approval of the Attorney General, shall make such rules and regulations as may be necessary to carry into effect the provisions of this chapter (Sections 701 to 747 of this title) and is authorized to prescribe the scope and nature of the examination of petitioners for naturalization as to their admissibility to citizenship for the purpose of making appropriate recommendations to the naturalization courts. Such examination shall be limited to inquiry concerning the applicant's residence, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, and other qualifications to become a naturalized citizen as required by law, and shall be uniform throughout the United States.”

Title 8 U.S.C.A., Section 728 (a) (b) (c), provides

that:

“The Commissioner shall cause to be made, for use in complying with the requirements of this chapter (Sections 701 to 747 of this title), a registry of each person arriving in the United States after the effective date of this Act, of the name, age, occupation, personal description (including height, complexion, color of hair and eyes, and fingerprints), the date and place of birth, nationality, the last residence, the intended place of residence in the United States, the date and place of arrival of said person, and the name of vessel or other means of transportation, upon which said person arrived.”

“Registry of aliens at ports of entry required by subsection (a) of this section may be made as to any alien not ineligible to citizenship in whose case there is no record of admission for permanent residence, if such alien shall make a satisfactory showing to the Commissioner, in accordance with regulations prescribed by the Commissioner, with the approval of the Attorney General, that such alien—

- (1) Entered the United States prior to July 1, 1924;
- (2) Has resided in the United States continuously since such entry;
- (3) Is a person of good moral character; and
- (4) Is not subject to deportation.”

“For the purposes of the immigration laws and naturalization laws an alien, in respect of whom a record of registry has been made as authorized by this section, shall be deemed to have been law-

fully admitted to the United States for permanent residence as of the date of such alien's entry."

Title 8 U.S.C.A., Section 729 (a), provides that:

"The certificate of arrival required by this chapter (Sections 701 to 747 of this title) may be issued upon application to the Commissioner in accordance with regulations prescribed by the Commissioner, with the approval of the Attorney General, upon the making of a record of registry as authorized by section 328 of this Act (Section 728 of this title)."

Title 8 U.S.C.A., Section 732 (c), provides that:

"At the time of filing the petition for naturalization there shall be filed with the clerk of court a certificate from the Service, if the petitioner arrived in the United States after June 29, 1906, stating the date, place, and manner of petitioner's arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition."

Title 8 U.S.C.A. 734(a) provides: "Except as provided in sub-section (b) of this section, every final hearing upon a petition for naturalization shall be had in open court before a judge thereof . . ."

Title 8 U.S.C.A., Section 738 (a), provides that:

"It shall be the duty of the United States district attorneys for the despective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 (Section 701 of this title) in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling

the certification of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.”

Title 8 U.S.C.A., Section 740, provides that:

“The Commissioner is authorized to cancel any certificate of citizenship or any copy of a declaration of intention or certificate of naturalization heretofore or hereafter issued by the Commissioner or a Deputy Commissioner if it shall appear to the Commissioner’s satisfaction that such document was illegally or fraudulently obtained from the Commissioner or a Deputy Commissioner; but the person to whom such document has been issued, shall be given at such person’s last known place of address, written notice of the intention to cancel such document with the reasons therefor and shall be given at least sixty days in which to show cause why such document should not be canceled. The cancelation of any such document shall affect only the document and not the citizenship status of the person in whose name the document was issued.”

Title 5 U.S.C.A., Section 1001 (c), provides that:

“Rule” means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. “Rule making”

means agency process for the formulation, amendment, repeal of a rule.”

Title 5 U.S.C.A., Section 1009 (a) (b) (c) (e), provides:

“Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action, within the meaning of any relevant statute, shall be entitled to judicial review thereof.”

“The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.”

“Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a de-

claratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority."

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (B) hold unlawful and set aside agency action . . . found to be . . . (3) in excess of statutory jurisdiction, authority, or limitations. . ."

Title 28 U.S.C.A., Section 2201, provides that:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Part 385 of Title 8 C.F.R. Revocation of Records Created and of Naturalization and Citizenship Documents issued by the Commissioner:

- A. 385.1 Report and Notice. "If at any time after certification of lawful entry has been issued, under part 362 of this chapter, or a certificate of naturalization has been issued, under part 378 * * * evidence becomes available indicating that such record or document was obtained illegally or fraudulently

complete report shall be promptly submitted to the Central Office or the appropriate Director with comment and recommendation; if the Commissioner or Deputy Commissioner is satisfied that a prima facie showing has been made that such record or document was obtained illegally or fraudulently he shall cause such District Director to have served * * * notice * * * that proceeding has been instituted to cancel the record or document * * * .”

- B. 385.2 Answer. * * * Upon receipt of such response or answer or upon expiration of time allowed for showing good cause the record shall be closed and forwarded to the Commissioner accompanied by findings of fact, conclusions of law and the recommendation of the official assigned * * * together with comment and recommendation of the District Director.”
- C. 385.3 If the Commissioner finds the record or document, or both, were procured illegally or through fraud he shall cancel ab initio such record or document or both.”

STATEMENT

The appellee does not controvert the appellant's statement of the case appearing on page 5 of Brief for Appellant.

ARGUMENT

The appellee agrees with the appellant that all of the errors assigned by the appellant are based on the

right of the Commissioner to direct the appellant to hold the hearing. The appellee does not agree that to determine the issues on this appeal it is necessary to assume that the record of registry and certificate of lawful entry were procured by false statements. There is no necessity to assume any such fact. That is not material here. It is true that appellee's complaint states that that is the ground upon which appellant is threatening to proceed with the hearing. However, the basis of appellee's actions to restrain the appellant from proceeding with the hearing *because he is acting beyond the scope of his authority under any law of the United States*.

The appellee admits that under the statutory provisions only the Commissioner is authorized to grant an application for registry, to issue a certificate of lawful entry and to issue a certificate of arrival. The regulation adopted by the Commissioner unlawfully purports to empower the Commissioner to cancel such documents, but the appellee contends that such regulation is beyond the scope of the statute and confers no power or authority upon the appellant to hold any hearing or do any thing, or take any action seeking to cancel the certificate of lawful entry.

The regulations under which the appellant purports to act profess to have been issued in pursuance of Title 8 U.S.C.A., Section 727. The scope of any regulations with respect to certificates issued by the Commissioner is limited and defined by Title 8 U.S.C.A., Section 740. That section prescribes the power of the Commissioner with respect to cancellation of certificates. Nowhere in that section is the Commissioner given power to cancel any certificates other than those specified therein; certificates of law-

ful entry and records of registry are not mentioned specifically, nor by implication in that section. The regulation promulgated and referred to as Part 385 of Title 8, C.F.R. can confer no power not authorized by the statute as stated by the Judge of the District Court in the memorandum opinion appearing in the transcript in this case on Page 25 as follows:

“It will be noted that the Act does not in terms authorize the Commissioner to cancel records of arrival or certificates of lawful entry. Counsel for the Government contend that power to do so may be implied from the authority specifically granted. I do not think so. In *Stark v. Wickard*, 32 U.S. 288, 309, the court said:

“When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of these agencies is circumscribed by the authority granted.”

See also *Arrow-Hart & H. Co. v. Commissioner*, 29 U.S. 587, 598. As express authority was by Congress limited to cancellation of certificates of citizenship, copies of declarations of intention to become citizens, and certificates of naturalization, the Commissioner is not authorized to cancel the registry or certificate mentioned in the complaint.”

It should be observed that the power to cancel other documents issued under subchapter 3 of the Nationality Act is reposed in the courts. Title 8 U.S.C.A., Section 738 (a).

The regulation challenged by the appellee is within the definition of a “rule” contained in Title 5, U.S.C.A., Section 1001 (a). With respect to the illegality of the regulation there is no administrative remedy to be exhausted. The unlawful exercise

of authority by an administrative body may be challenged in any court of competent jurisdiction. Title 5 U.S.C.A., Section 1009 (a), (b), (c), (e). A local federal officer acting under color of his office and beyond the scope of his authority may be restrained immediately from so acting without the necessity of a complaining party joining his superior as a party to the action. This proposition of law was reviewed and carefully analyzed by this Circuit Court of Appeals in the case of *Neher v. Harwood*, 128 Fed. (2d) 846. The case is reported in 158 A.L.R., Page 1116 and is thoroughly annotated in said volume at Page 1126.

This is a proper proceeding for the appellee to seek a declaratory judgment under Title 28 U.S.C.A., Section 2201 and to seek an injunction because of the irreparable injury he will suffer in the event the unlawful proceedings sought to be carried out by the appellant are not stayed. The appellee has no administrative remedy. The administrative body is acting beyond its power. If it is permitted to act it may deprive the appellee of his statutory right to have a court pass upon his qualifications to be admitted to citizenship, Title 8 U.S.C.A., Section 734 (a). No such a hearing can be accorded him without a certificate of arrival, Title 8 U.S.C.A., Section 732 (c). The certificate of arrival is only issued where there is a record of registry, Title 8 U.S.C.A., Section 729 (a). The record of registry has been made and the certificate of lawful entry issued. Title 8 U.S.C.A., Section 728. If the appellee is not eligible to citizenship in the judgment of the Commissioner of Immigration and Naturalization, the Commissioner may show that fact to the naturalization court

at the appropriate hearing, Title 8 U.S.C.A., Section 734 (a). The record of registry and the certificate of lawful entry and the certificate of arrival will not bar such a hearing and will not prevent an inquiry into those facts before a court of competent jurisdiction at a time and place provided therefor by Congress. Should the Commissioner seek to deport the appellee, the record of registry would not bar that proceeding. If the appellee is unlawfully in the United States, irrespective of whether a record of lawful entry has been made or not, Congress has provided that he may be deported, Title 8 U.S.C.A., Sections 155 and 214. The establishment of the record of registry and certificate of lawful entry merely entitle the appellee to have the Commissioner issue to the Clerk of the Naturalization Court a certificate of arrival which is prerequisite to the filing of a petition for naturalization, Title 8 U.S.C.A., Section 732 (c), upon which a hearing as to the good moral character of the appellee may be had, Title 8 U.S.C.A., Section 734 (a). In order that the appellee may have such a hearing there is a vital necessity for a determination of his rights at this time.

If the Commissioner so long ago as April 17, 1941 improvidently issued the certificate of lawful entry and made a record of registry the government has not been prejudiced and has ample opportunity to protect itself. It can urge its contentions by resisting the petition for naturalization or it may bring a direct proceeding seeking the deportation of the appellee. The record of registry is not a bar to any inquiry into the alien's right to remain in the United States, return thereto, or be admitted to citizenship. Re-entry permits under Title 8, U.S.C.A., Section 210 have

the same status as the record of registry and certificate of lawful entry here sought to be cancelled. Without citing authorities in support thereof, it should be stated that such certificates may be disregarded at any time when an alien presents himself for readmission and an inquiry may be conducted into his right to return to the United States; if he is admitted on such a permit, an inquiry as to his right to remain in the United States may be had by deportation proceedings at any time; likewise if he obtained the record of registry and certificate of lawful entry because of his failure to be of good moral character, an inquiry into his good moral character can be made at any time *in a naturalization proceeding before the court*, Title 8 U.S.C.A., Section 734. The only purpose the record of registry serves is to authorize the Commissioner to issue the certificate of arrival prescribed in Title 8 U.S.C.A., Section 732 (c). The statute was passed in recognition of the knowledge that many aliens had been admitted into the United States lawfully and that because of human error in handling so many thousands of people a record of the admission could not be located; as a means of permitting such persons who had entered the United States in past years to seek naturalization, Congress provided for the legalization of their residence for naturalization purposes as set out in Title 8 U.S.C.A., Section 728, so that persons who were lawfully entitled to remain in the United States could comply with Title 8 U.S.C.A., Section 732 (c) at the time of filing petitions for naturalization.

The appellant is correct when he states that the only reported case is the case of *Dopico v. Revell*, 73 Fed. (2d) 221, wherein a certificate of registry was

cancelled by the Commissioner. It is pointed out, however, that the case referred to arose out of a writ of habeas corpus instituted to prevent the deportation of the petitioner. The validity of the cancellation of the certificate of lawful entry upon the basis that the Commissioner was without power to cancel such a certificate was not before the court. As the court pointed out, in considering the legality of the cancellation the court only considered the question of a fair hearing. The power of the Commissioner to cancel does not appear to have been raised. The only matter the court had before it was the fairness of the hearing. Actually, whether the certificate of registry was cancelled or not in that case, made no difference. The matter was simply a matter of deportation and the certificate of registry could have been disregarded. It is submitted that the citation referred to is of no help to the court in this matter.

CONCLUSION

It is respectfully submitted that:

1. Judge Holly correctly stated the law in his opinion in this language (TR 25):

“As express authority was by Congress limited to cancellation of certificates of citizenship, copies of declarations of intention to become citizens, and certificates of naturalization, the Commissioner is not authorized to cancel the registry or certificate mentioned in the complaint.”

Regulation Part 385, Title 8 C.F.R., should therefore by this Court be held to be invalid insofar as it purports to confer any power upon the Commissioner to cancel a record of registry and certificate of lawful

admission and any power upon the appellant to do anything to that end under such regulation.

2. The Commissioner is not a necessary party as stated by Judge Holly in the transcript in this case on Page 26, in this language:

“... where the complaint is that the superior officer is abusing a discretion legally vested in him he is a necessary party to the action, but where it is charged and the question for determination is whether the order of the superior is beyond his authority, the superior is not a necessary party. That is the situation here.”

3. The action is not premature since the appellee has no adequate remedy against the unlawful act of the appellant.

4. The appellee has no adequate remedy at law, although the appellant has no adequate remedy available to him if anything is attempted to be done by the appellee under the record of registry and certificate of lawful admission.

The judgment of the trial court should be affirmed.

Respectfully submitted,

SCRUGGS AND BUTTERFIELD

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No. 12,268

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HERRIE BREWSTER,

Appellant,

VS.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

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No. 12,268

IN THE

**United States Court of Appeals
For the Ninth Circuit**

HERRIE BREWSTER,

Appellant,

vs.

E. B. SWOPE, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", denying appellant's petition for writ of habeas corpus. (Tr. 43-44.) The Court below had jurisdiction over the habeas corpus proceedings under Title 28 U.S.C.A., Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below denying the petition is conferred upon this Honorable Court by Title 28 U.S. C.A., Section 2253.

STATEMENT OF THE CASE.

The appellant, a military prisoner, confined at the United States Penitentiary, at Alcatraz, California, filed a petition for writ of habeas corpus in which he alleged, in substance, that his detention by the appellee, the Warden of the said prison, is illegal because he was twice placed in jeopardy for the same offense, in contravention to the Fifth Amendment to the Constitution. Thereafter the Court below issued an order to show cause (Tr. 8), and the appellee filed a return to order to show cause. (Tr. 9-35.) The appellant thereupon filed a motion to expunge from the record appellee's Exhibit A-7, which was attached to the return (Tr. 36-37), and likewise filed a traverse to return to order to show cause. (Tr. 38-42.) The matter was then submitted and the Court below, without granting appellant's motion to expunge appellee's Exhibit A-7, as aforesaid, entered its order denying petition for writ of habeas corpus. (Tr. 43-44.)

From this latter order appellant now appeals to this Honorable Court. (Tr. 45.)

QUESTION.

Was the appellant twice placed in jeopardy for the same offense, contrary to the provisions of the Fifth Amendment to the Constitution?

CONTENTION OF APPELLEE.

The answer to the above stated question is: No.

ARGUMENT.

In denying appellant's application for writ of habeas corpus the Court below entered the following order:

"Upon the filing of the petition for the writ of habeas corpus herein, the Court ordered Respondent to show cause why the writ should not issue. Upon the return of the respondent thereto and the traverse of petitioner, the petition has been submitted.

"It may be determined upon the record now before the Court, inasmuch as no issue of fact requires resolution.

"Petitioner's claim, as asserted in the petition, is that he was put in jeopardy twice for the same offense contrary to the provisions of the Fifth Amendment to the Constitution. It is true that he was retried for the same offense after the reviewing military authority had so ordered. But this was pursuant to Article 50 $\frac{1}{2}$ Articles of War 10 USC 1522. Article 50 $\frac{1}{2}$ is a proper and constitutional exercise of Congressional authority. *Sanford v. Robbins*, 5 Cir. 115 Fed. (2d) 435, 439. Cert. Den. 312 U.S. 697.

"The claim of 'double jeopardy' is without merit. *Palko v. Connecticut*, 302 U.S. 320, 328; *In re Wrublewski*, 71 Fed. Supp. 143, affirmed *Wrublewski v. McInerney*, 9 Cir. 166 Fed. (2d) 243; *Ex parte Benton*, 63 Fed. Supp. 808.

“The petition is denied and the proceeding is dismissed.

Dated: April 28, 1949.

LOUIS E. GOODMAN,

United States District Judge.”

(Tr. 43-44.)

Appellant was originally tried and convicted of murder by general court-martial, which conviction was set aside and a rehearing ordered by the reviewing authority. The rehearing, or retrial, also resulted in his conviction and sentence which he is now presently serving. In connection with appellant's allegation of a prior trial for the same offense, it should be noted that the action taken by the reviewing authority on June 29, 1943 (appellant's Exhibit A-1, Tr. 14), in disapproving the initial sentence and ordering a rehearing, or retrial, was taken pursuant to statutory authority contained in the fourth paragraph of Article of War 50½ (Title 10 U.S.C.A. Section 1522), which provides in pertinent part as follows:

“* * * When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a Court composed of officers not members of the Court which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first Court, and no sentence in excess of or more severe than the original sentence

shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding. * * *

The mentioned action on June 29, 1943, was not "final action" within the meaning of Article of War 40 (Title 10 U.S.C.A. Section 1511), which provides in appropriate portion as follows:

"No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case. * * *

With particular reference to the plea of double jeopardy, attention is called to this pronouncement of the Supreme Court of the United States, in *Palko v. Connecticut*, 302 U.S. 320, at page 328:

"Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions? The answer surely must be 'No'. * * * It (the statute) asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. * * *

"If the trial had been infected with error adverse to the accused, there might have been re-

view at his instance, and as often as necessary to purge the vicious taint. * * *

“The conviction of appellant is not in derogation of any privileges or immunities that belong to him as a citizen of the United States.”

With further reference to the plea of double jeopardy as raised by a member of the military, appellee calls attention to the language of this Honorable Court, in *Wrublewski v. McInerney*, 166 Fed. (2d) 243, at page 245, affirming the decision of the District Court reported in 71 Fed. Supp. 143:

“(3) The constitutional guaranty against double jeopardy concerns itself with matters of substance, not with ingeniously assembled shadows. Petitioner has nothing of substance to complain of. He would appear to have emerged from this chapter of errors in a more favorable position than he would have been in had the errors not been committed.”

See also *Wade v. Hunter*, 336 U.S. 684, wherein the Supreme Court of the United States, in affirming the decision of the Court of Appeals reversing the judgment of the District Court which had ordered petitioner's release on the ground that his conviction by court-martial had violated the double-jeopardy provision of the Fifth Amendment, stated at pages 688 and 689, as follows:

“* * * The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such

a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. * * *"

In *Ex parte Benton* (D.C. N.D. Cal.) 63 Fed. Supp. 808, 809, 810, the Court declared:

"It is not questioned, as indeed it could not be by virtue of an unbroken line of authority, that civil courts cannot review the judgments of courts martial, on habeas corpus, if the military had jurisdiction to try the offender and if the sentence of the Court or commission was within its power to pronounce. *United States v. Grimley*, 137 U.S. 147, 11 S. Ct. 54, 34 L. Ed. 636; *Swaim v. United States*, 165 U.S. 553, 17 S. Ct. 448, 41 L. Ed. 823; *Mullan v. United States*, 212 U.S. 516, 29 S. Ct. 330, 53 L. Ed. 632; *Ex parte Mason*, 105 U.S. 696, 26 L. Ed. 1213; *Ex parte Reed*, 100 U.S. 13, 25 L. Ed. 538; *Carter v. McClaughry*, 183 U.S. 365, 22 S. Ct. 181, 46 L. Ed. 236."

CONCLUSION.

It being apparent, from the foregoing authorities cited by the Court below in its order as well as by the appellee in his argument herein, that appellant's

claim of "double jeopardy" is without merit, and it being further apparent that the court-martial which retried the appellant for the offense of which he now stands convicted had jurisdiction over his person, and that the sentence which appellant is now serving was within the power of the military to pronounce, it follows that his detention by the appellee is legal, and that, accordingly, the order of the Court below denying the petition for writ of habeas corpus is correct and should be affirmed.

Dated, San Francisco, California,
August 19, 1949.

Respectfully submitted,

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No. 12270

United States
Court of Appeals
For the Ninth Circuit.

INTERNATIONAL ELECTRIC COMPANY,
Appellant,

VS.

INTERNATIONAL ELECTRIC FENCE CO., a
Washington Corporation and GEORGE N.
HUGHES,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Southern Division.

FILED

OCT 28 1948

PAUL P. O'BRIEN,

No. 12270

United States
Court of Appeals
For the Ninth Circuit.

INTERNATIONAL ELECTRIC COMPANY,
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In the District Court of the United States
Western District of Washington, Southern Division
Civil Action No. 1077

INTERNATIONAL ELECTRIC COMPANY,
an Illinois Corporation,

Plaintiff,

vs.

INTERNATIONAL ELECTRIC FENCE CO., a
Washington Corporation, and GEORGE N.
HUGHES,

Defendants.

AMENDED COMPLAINT

To the Honorable the Judge of the District Court
of the United States for the Western District
of Washington, Southern Division:

I.

Plaintiff, International Electric Company is a corporation organized and existing under and by virtue of the Laws of the State of Illinois, having its principal place of business in Chicago, Cook County, State of Illinois.

II.

Defendants, International Electric Fence Co., is a corporation organized and existing under and by virtue of the Laws of the State of Washington, having its principal place of business in Vancouver, Clarke County, State of Washington, and defend-

ant, George N. Hughes, is an individual residing in Vancouver, Clarke County and State of Washington.

III.

The jurisdiction of this Court is based upon the fact that this cause of action arises under the Trade-Mark Laws of the United States (U. S. C. Title 15, Sec. 97) as hereinafter more fully set forth; and the fact that there is a diversity of citizenship and the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars; and the fact that defendants have a regularly established place of business in the Southern Division of the Western District of Washington, and has committed the acts of infringement complained of within the Southern Division of the Western District of Washington, and elsewhere in the United States.

IV.

On October 8th, 1946, United States Certificate of Trade-Mark, Registration No. 424,467 was duly issued to Richard H. Turk, doing business as International Electric Fence Co., for the trade-mark "International" as used on Electric Fences, a true copy of the said Certificate of Trade-mark being hereto attached, marked Plaintiff's Exhibit "I," and by this reference thereto made a part hereof as if fully set forth herein.

V.

On June 10th, 1947, the said Richard H. Turk

assigned his entire right, title and interest in said trade-mark "International," and the Certificate of Registration No. 424,467 to the plaintiff, International Electric Company, said assignment being recorded in the United States Patent Office on June 13th, 1947, Liber A-212, Page 299, and a true copy of which said assignment is hereto attached, marked Plaintiff's Exhibit "II," and by this reference thereto made a part hereof as if fully set forth herein.

VI.

By virtue of the above specified assignment the plaintiff is the legal owner of the entire right, title and interest in and to said trade-mark "International," and the said Certificate of Registration No. 424,467.

VII.

That on January 1st, 1938, the plaintiff and its predecessors in business, adopted and used, and is now using said trade-mark "International" as a trade-mark for Electric Fences, Fence Controllers, Stock Prods, Insect and Fly Traps and Electric Heaters.

VIII.

That since January 1st, 1938, the plaintiff and its predecessors in business has continuously used said mark in interstate commerce not only on Electric Fences but on goods having the same descriptive properties, namely those goods set forth in Paragraph VII hereof, and defendant, International Electric Fence Co., has, without the consent

of Plaintiff, applied said trade-mark to some or all of the goods set forth in paragraph VII hereof, or to goods having substantially the same descriptive properties as those set forth in said Registration No. 424,467, or has affixed said trade-mark to labels, signs, prints, packages, wrappers, or receptacles used in connection with the sale of said goods, and said infringement of plaintiff's trade-mark and registration thereof has occurred in the sale of said goods in interstate commerce; and plaintiff further alleges, on information and belief that defendant, George N. Hughes, is president of defendant, International Electric Fence Co., and that Hughes is the principal stockholder of International Electric Fence Co., defendant herein; that said infringement has taken place under the protection and control and with the advice, consent and approval of said defendant, Hughes, and that said defendant, Hughes, has deliberately, intentionally, wilfully and knowingly used said corporation as an instrument to carry out his own wilful and deliberate infringement, and plaintiff therefore prays that said George N. Hughes as an individual be held jointly and severally liable with said International Electric Fence Co., for the damages sustained by plaintiff by reason of said infringement and the profits gained by International Electric Fence Co., and said individual by reason of said infringement.

IX.

Plaintiff notified defendant, International Electric Fence Co., on May 26th, 1947, by United States

Registered mail, of its rights under its trade-mark "International" and its certificate of Registration No. 424,467, and of the fact that defendants unauthorized use of an identical mark on Electric Fences was an infringement of its rights and demanded defendant cease its use of this mark; that a true copy of the said letter notifying the defendant, International Electric Fence Company, of the plaintiff's rights under its trade-mark "International" is hereto attached, marked plaintiff's Exhibit "III," and by this reference thereto made a part hereof as if fully set forth herein.

X.

Defendant has infringed plaintiff's trade-mark "International" since July 1st, 1944, by marking its Electric Fences, Stock Prods and Electric Fence Controllers with the trade-mark "International," and threatens to continue to do so unless enjoined by this Court, to the great injury and damage of the plaintiff.

XI.

Plaintiff further alleges the fact to be, upon information and belief, that defendants are unfairly competing with plaintiff in that they are selling and offering for sale Electric Fences, Stock Prods and similar products, bearing the name "International," to the public at prices which are considerably lower than the prices of the same goods of plaintiff, and they are misrepresenting that they are plaintiff corporation, all with the object in mind of unfairly

competing with plaintiff to its great and irreparable injury.

Wherefore, Plaintiff prays:

(1) A preliminary injunction pending this suit, and a permanent injunction thereafter, restricting and enjoining the defendants, the officers of the defendant, International Electric Fence Co., the agents, servants, employees and attorneys and those in active concert or participation with each or both of said defendants, from using and infringing said trade-mark "International" of plaintiff or offering to do so or aiding or abetting or in any way inducing infringement of plaintiff's trade-mark registration and that defendants be ordered to deliver up, an oath, for impounding and destruction all of the infringing copies of said trade-mark, together with all plates, molds, matrices or other instruments for making such infringing copies.

(2) That defendants be enjoined from making, using or selling products bearing the trade-mark "International" of plaintiff or indicating in any way that the goods sold by defendants are made in accordance with the directions or under the supervision of plaintiff.

(3) That the defendants be required by decree of this Honorable Court to account for and pay over to plaintiff such gains and profits as have accrued to defendants but for the unlawful doings of said defendants, and all damages that plaintiff may have suffered or sustained thereby, and that this Honorable Court may increase the actual dam-

ages so assessed against the defendants to a sum equal to three times the sum of such assessment in view of the aggravated wanton character of defendants infringement.

(4) That full costs be allowed Plaintiff and that the Court award Plaintiff reasonable attorney's fees as part of said costs.

(5) That it be granted such other and further relief as equity and the Court may deem just.

/s/ BURTON W. LYON, JR.,

Attorney for Plaintiff.

/s/ W. A. SNOW,

Attorney for Plaintiff.

State of Washington,
County of Pierce—ss.

Burton W. Lyon, Jr., being first duly sworn upon his oath, deposes and says: That he is one of the attorneys for the plaintiff in this action; that he has read the foregoing Amended Complaint, knows the contents thereof, and that he verily believes the statements therein are true.

The reason why the Amended Complaint in this cause is not verified by an officer of said corporation is that its place of business is at Chicago, Cook County, Illinois, and that none of its officers are now within the County of Pierce, State of Washington.

/s/ BURTON W. LYON, JR.

Subscribed and Sworn to before me this 9th day of June, 1948.

[Seal] DIX H. ROWLAND,
Notary Public in and for the State of Washington,
residing at Tacoma.

Receipt of copy of foregoing Amended Complaint acknowledged this 9 day of June, 1948.

METZGER, BLAIR, GARDNER
& BOLDT,
Attorneys for Defendants.

[Endorsed]: Filed June 9, 1948.

[Title of District Court and Cause.]

AMENDED ANSWER

To the Honorable Judges of the United States District Court for the Western District of Washington, Southern Division:

Come now defendants and for their amended answer to the amended complaint of plaintiff on file herein, admit, deny and allege as follows:

I.

That as to the truth of the allegations of Paragraph I of said amended complaint, defendants have no knowledge or information sufficient to form a belief, and, therefore, deny the same.

II.

Admit the allegations of Paragraphs II and III of said amended complaint.

III.

Admit that on October 8, 1946, U. S. trade mark registration No. 424467 was issued to Richard H. Turk for the trade mark "International" as used on electric fences, and admit that plaintiff's Exhibit 1 is a true copy thereof. Defendants deny all of the other allegations of Paragraph IV of said amended complaint and particularly deny that either said Richard H. Turk or plaintiff lawfully or properly was or is entitled to the use of said name as applied to electric fences or to goods having substantially the same descriptive properties as those set forth in said registration No. 424467, or to the registration thereof.

IV.

That as to the truth of the allegations of Paragraph V of said amended complaint, defendants have no knowledge or information sufficient to form a belief and, therefore, deny the same.

V.

Defendants deny each and every allegation of Paragraphs VI and VII of said amended complaint.

VI.

Admit that defendant, International Electric Fence Co., has applied said trade mark to some or all of the goods referred to in Paragraph VII of plaintiff's complaint in the sale of said goods in inter-state commerce; admit that defendant, George N. Hughes, is president and principal stock-

holder of defendant, International Electric Fence Co.; deny each and every other allegation of Paragraph VIII of said amended complaint.

VII.

Admit that the letter referred to in Paragraph IX of said amended complaint was written and that it was received by defendants. Deny each and every other allegation of said Paragraph IX of said amended complaint.

VIII.

Deny each and every allegation set forth in Paragraphs X and XI of said amended complaint.

IX.

Except as hereinbefore specifically admitted and denied, defendants deny generally and specifically each and every allegation contained in plaintiff's amended complaint.

For a Further Answer and as a First Affirmative Defense, defendant allege as follows:

I.

That on or about the 7th day of May, 1947, plaintiff commenced an action against defendants in the Superior Court of the State of Washington in and for Clark County, being Cause No. 22532 of said court. That defendants were served with process in said action and appeared in said cause, which proceeded to a trial on the merits and resulted in the entry of a final order and judgment

of the court, dated October 7, 1947, wherein and whereby a final adjudication on the merits was made by the court in favor of defendants and against plaintiff. That no appeal from said order and judgment has been taken, and the time therefor has expired. That in said Cause No. 22532 of the Washington Superior Court for Clark County, the alleged cause of action in plaintiff's complaint herein and all matters and issues herein were and might have been litigated, and by reason thereof are and have become res adjudicata.

For a Further Answer and as a Second Affirmative Defense, defendants allege as follows:

I.

That any and all right, title and interest, if any, of plaintiff corporation in and to the trade name referred to in plaintiff's complaint, and the right of use thereof, was acquired by plaintiff corporation from Richard H. Turk and Phyllis Turk, his wife. That said Turk and wife organized plaintiff corporation, operate same and are the sole or principal owners of the capital stock thereof.

II.

That prior to October 1, 1941, the said Richard H. Turk was engaged in business in the State of Washington and elsewhere under the firm name of "International Electric Fence Co.," and in connection with said business using the trade name "International" as applied to electric fences and goods having the same descriptive properties manufac-

tured and/or sold or distributed by him in the conduct of said business. That on or about the 1st day of October, 1941, the said Turk and wife, together with the defendants Hughes, caused defendant corporation to be organized and incorporated, and the said Turk and wife subscribed for and became the owners of one-half of the stock of said corporation. That said corporation was formed for the purpose of acquiring and did acquire the said business previously conducted by said Turk, together with all assets thereof, including the name "International Electric Fence Co." as a name for said corporation, and including the trade name "International" as applied to electric fences and goods having the same descriptive properties. That continuously from the date of the incorporation of defendant corporation to the present time, and throughout the period when the said Turk and wife were actively participating in the affairs and business of defendant corporation as officers thereof and as the owners of one-half of the capital stock thereof, defendant corporation used and applied the trade name "International" to the said products handled by it and widely and extensively advertised and publicize such name in connection therewith.

III.

That in June, 1944, and long prior to the execution of the assignment attached to plaintiff's complaint, for a valuable and substantial consideration paid to them, the said Turk and wife sold, trans-

ferred and delivered to defendants Hughes all of the capital stock of defendant corporation owned by the said Turk and wife, together with any and all rights and assets of any and every nature incident thereto, including the right to the use of the trade name referred to in plaintiff's complaint. That from and after the said sale of their stock in defendant corporation, neither said Turk nor his wife had any right or interest, either direct or indirect, of any nature in or to the said trade name referred to in plaintiff's complaint or the right of use thereof. That defendant corporation owned and still owns and was and is a prior user of the trade name referred to in plaintiff's complaint, and that by reason of the facts and circumstances in this Second Affirmative Defense alleged, plaintiff is estopped and barred from claiming, asserting or maintaining any right, title, claim or interest of any nature in and to the said trade name referred to in plaintiff's complaint and the right of use thereof.

Wherefore, having fully answered the amended complaint of plaintiff, defendants pray that same be dismissed and that defendants have and recover judgment against plaintiff for defendants' costs and disbursements herein to be taxed and for such other and further relief as the facts and law warrant and to the court may seem just.

METZGER, BLAIR, GARDNER
& BOLDT,
/s/ GEO. H. BOLDT,
Attorneys for Defendants.

Service hereof by receipt of copy acknowledged this 2 day of October, 1948.

/s/ BURTON W. LYON, JR.,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 2, 1948.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSION OF LAW

This cause coming on regularly for trial in open court before the undersigned Judge of the above-entitled court, sitting without a jury, on the 13th, 14th and 17th days of January, 1949, plaintiff appearing by its President, R. H. Turk, and by its counsel, William A. Snow, of Rummler, Rummler & Snow, and Burton W. Lyon, Jr., defendants appearing by defendant Hughes personally and as President of defendant corporation, and by defendants' counsel, George H. Boldt, of Metzger, Blair, Gardner & Boldt, and the evidence of the parties being submitted together with the argument of counsel, and the Court having heard and considered the same, does now make the following

Findings of Fact:

I.

Plaintiff, International Electric Company. is a corporation organized and existing under and by virtue of the Laws of the State of Illinois, having its principal place of business in Chicago, Cook County, State of Illinois.

II.

Defendant, International Electric Fence Co., is a corporation organized and existing under and by virtue of the Laws of the State of Washington, having its principal place of business in Vancouver, Clark County, State of Washington, and defendant, George N. Hughes, is an individual residing in Vancouver, Clark County and State of Washington.

III.

The jurisdiction of this Court is based upon the fact that this cause of action arises under the Trade-Mark Laws of the United States (U. S. C. Title 15, Sec. 97) as hereinafter more fully set forth; and the fact that there is a diversity of citizenship and the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars; and the fact that defendants have a regularly established place of business in the Southern Division of the Western District of Washington, and have committed the acts of alleged infringement complained of within the Southern Division of the Western District of Washington, and elsewhere in the United States.

IV.

On October 8, 1946, United States Certificate of Trade-Mark, Registration No. 424,467 was issued to Richard H. Turk, doing business as International Electric Fence Co., for the trade-mark "International" as used on electric fences, a true copy of the said Certificate of Trade-Mark being admitted in evidence as Plaintiff's Exhibit 2, and by this

reference thereto made a part hereof as if fully set for herein.

V.

On June 10, 1947, the said Richard H. Turk assigned his entire right, title and interest in said trade-mark "International," and the Certificate of Registration No. 424,467 to the plaintiff, International Electric Company, said assignment being recorded in the United States Patent Office on June 13, 1947, Liber A-212, Page 299, and a true copy of which said assignment being admitted in evidence as Plaintiff's Exhibit 3, and by this reference made a part hereof as if fully set forth herein, and that plaintiff is the true and lawful owner thereof.

VI.

That on or about January 1, 1938, the predecessors in business and interest of both plaintiff corporation and defendant corporation adopted and used, ever since have continuously used and are now using in interstate commerce said trade-mark "International" as a trade-mark for electric fences, fence controllers, stock prods, insect and fly traps and electric heaters.

VII.

That by a letter dated May 26, 1947, mailed to and received by defendant corporation by United States Registered mail, plaintiff asserted a prior and exclusive right to the use of the said trade-mark "International" and an infringement thereof by defendants, a copy of said letter being admitted in

evidence as Plaintiff's Exhibit 4, and by this reference made a part hereof as if fully set forth herein.

VIII.

That any and all right, title and interest of plaintiff corporation in and to the trade-mark and certificate of registration hereinbefore referred to, and the right of use thereof, was acquired by plaintiff corporation from Richard H. Turk and Phyllis Turk, his wife. That said Turk and wife organized plaintiff corporation, operate same and are the owners of more than 90% of the capital stock thereof.

IX.

That prior to October 1, 1941, the said Richard H. Turk was engaged in business in the State of Washington and elsewhere under the firm name of "International Electric Fence Co.," and in connection with said business using the trade-mark "International" as applied to electric fences and goods having the same descriptive properties manufactured and/or sold or distributed by him in the conduct of said business. That on or about the 9th day of October, 1941, the said Turk and wife, together with the defendant Hughes, caused defendant corporation to be organized and incorporated, and the said Turk and wife subscribed for and became the owners of one-half of the stock of said corporation and defendant Hughes and wife subscribed for and became the owners of the remaining one-half thereof. That said corporation was formed for the purpose of acquiring and did acquire the said business previously conducted by said Turk,

together with all assets thereof, including the name "International Electric Fence Co." as a name for said corporation, and including the right to the use of the trade-mark "International" as applied to electric fences and goods having the same descriptive properties in the States of Washington, Oregon, Idaho, California, Utah, Nevada, Montana, Wyoming, Colorado, Arizona and New Mexico. That continuously from the date of the incorporation of defendant corporation to the present time, and throughout the period when the said Turk and wife were actively participating in the affairs and business of defendant corporation as officers thereof and as the owners of one-half of the capital stock thereof, defendant corporation used and applied the trade-mark "International" to the said products handled by it and widely and extensively advertised and publicized such name in connection therewith in the states above enumerated.

X.

That on or about July 1, 1944, and long prior to the execution of the assignment by R. H. Turk to plaintiff corporation hereinbefore referred to, for a valuable and substantial consideration paid to them, the said Turk and wife sold, transferred and delivered to defendant Hughes all of the capital stock of defendant corporation owned by the said Turk and wife, together with any and all rights and assets of any and every nature incident thereto, including the right to the use of the trade-mark hereinbefore referred to in the states enumerated in the next preceding paragraph. That from and after

the said sale of the stock of Turk and wife in defendant corporation, defendant corporation continued to own, now owns and has the right to the use of said trade-mark "International" as applied to electric fences, fence controllers, stock prods, insect and flytraps and electric heaters in the states enumerated in the next preceding paragraph hereof.

XI.

That under and by virtue of the agreement and conduct of the parties and their predecessors in business and interest, and by reason of the facts herein found, plaintiff corporation and defendant corporation each and both own and hold and have the right of concurrent use by both of the said trade-mark "International" as applied to the products hereinbefore referred to in the states hereinbefore enumerated. That neither defendant corporation nor defendant, George N. Hughes, has any right of use whatever of said trade-mark as applied to said products other than in the states enumerated.

XII.

That defendants have not unfairly competed with plaintiff in any of the particulars referred to in plaintiff's Amended Complaint or otherwise.

Done in Open Court this 18th day of February, 1949.

/s/ CHARLES H. LEAVY,
U. S. District Judge.

From the foregoing Findings of Fact, the Court does now make the following

Conclusions of Law:

1. That plaintiff is not entitled to relief in any of the respects or particulars referred to in plaintiff's Amended Complaint or otherwise, and that plaintiff's Amended Complaint and the above-entitled action ought to be dismissed on the merits and with prejudice but without costs to either party.

2. That judgment and decree of the Court ought to be entered providing as follows:

That plaintiff corporation and defendant corporation each and both have the right to concurrently use the trade-mark "International" as applied to electric fences, fence controllers, stock prods, insect and fly traps and electric heaters in the States of Washington, Oregon, Idaho, California, Utah, Nevada, Montana, Wyoming, Colorado, Arizona and New Mexico. That neither defendant corporation nor defendant, George N. Hughes, has the right to use said trade-mark as applied to said products except in the states enumerated.

Done in Open Court this 18th day of February, 1949.

/s/ CHARLES H. LEAVY,
U. S. District Judge.

Presented by:

/s/ GEO. H. BOLDT,
Of Attorneys for Defendants.

Copy received this 26th day of January, 1949.

/s/ BURTON W. LYON, JR.,
Of Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 18, 1949.

In the District Court of the United States Western
District of Washington, Southern Division

Civil Action No. 1077

INTERNATIONAL ELECTRIC COMPANY, an
Illinois corporation,

Plaintiff,

vs.

INTERNATIONAL ELECTRIC FENCE CO., a
Washington corporation; and GEORGE N.
HUGHES,

Defendants.

DECREE

This cause coming on regularly for trial in open court before the undersigned Judge of the above-entitled court, sitting without a jury, on the 13th, 14th and 17th days of January, 1949, plaintiff appearing by its President, R. H. Turk, and by its counsel, William A. Snow, of Rummler, Rummler & Snow, and Burton W. Lyon, Jr., defendants appearing by defendant Hughes personally and as President of defendant corporation, and by defendants' counsel, George H. Boldt, of Metzger, Blair, Gardner & Boldt, and the evidence of the parties being submitted together with the argument of counsel, and the Court having heard and considered the same, and having heretofore made and entered herein Findings of Fact and Conclusions of Law in writing,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed by the Court as follows:

1. That Plaintiff's Amended Complaint and the above-entitled action be and the same hereby are dismissed on the merits and with prejudice.

2. That plaintiff corporation is the true and lawful owner of Certificate of Registration No. 424467, registered October 8, 1946.

3. That plaintiff corporation and defendant corporation each and both have the right to concurrently use the trade-mark "International" as applied to electric fences, fence controllers, stock prods, insect and fly traps and electric heaters in the States of Washington, Oregon, Idaho, California, Utah, Nevada, Montana, Wyoming, Colorado, Arizona and New Mexico. That neither defendant corporation nor defendant, George N. Hughes, has the right to use said trade-mark as applied to said products except in the states enumerated.

4. That neither party recover judgment for costs herein.

Done in Open Court this 18th day of February, 1949.

/s/ CHARLES H. LEAVY,
U. S. District Judge.

Presented by:

/s/ GEO. H. BOLDT,
Of Attorneys for Defendants.

Copy received this 18th day of February, 1949.
Notice of Presentation Waived.

/s/ BURTON W. LYON, JR.,
Of Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 18, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that International Electric Company, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on February 18, 1949, except that part where it is adjudged that plaintiff corporation is the true and lawful owner of Certificate of Registration No. 424,467 registered October 8, 1946.

/s/ W. A. SNOW,
Attorney for Plaintiff.

Copy of the within and foregoing Notice of Appeal mailed to Messrs. Metzger, Blair, Gardner & Boldt, attorneys for defendant, this 17th day of March, 1949.

/s/ E. E. REDMAYNE,
Deputy Clerk.

Dated March 16, 1949.

[Endorsed]: Filed March 17, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
TRANSCRIPT WITH CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

The matter of the plaintiff's motion for an order extending the time for filing the transcript of trial proceedings in the above-entitled action in the Circuit Court of Appeals for the Ninth Circuit for an additional period of fifty days, having come on regularly before this Court, and no objections having been made thereto, and the Court being fully advised in the premises:

It Is Hereby Ordered, Adjudged and Decreed, That the time for filing the transcript of trial proceedings in the above-entitled action in the matter of the plaintiff's appeal to the Circuit Court of Appeals for the Ninth Circuit, from the judgment rendered by this Court in the above-entitled action on the 18th day of February, 1949, be and the same is hereby extended for an additional period of fifty days, which said additional period for filing the transcript on appeal shall expire on the 16th day of June, 1949.

Done in Open Court, this 22nd day of April, 1949.

/s/ CHARLES H. LEAVY,
Judge of U. S. District Court.

Presented by:

/s/ BURTON W. LYON, JR.,
Of Attorneys for Plaintiff.

Copy received and approved this 21st day of April, 1949.

METZGER, BLAIR, GARDNER
& BOLDT,

By /s/ GEO. H. BOLDT,
Attorneys for Defendants.

[Endorsed]: Filed April 22, 1949.

[Title of District Court and Cause.]

ORDER PERMITTING PLAINTIFF TO FILE
COST BOND ON APPEAL

The matter of the plaintiff's motion for an order authorizing and permitting the plaintiff to file a cost bond on plaintiff's appeal from the judgment of the above-entitled Court in the above-entitled action, dated February 18th, 1949, to the United States Circuit Court of Appeals for the Ninth Circuit pursuant to the said plaintiff's Notice of Appeal filed in the above-entitled Court on March 18th, 1949, having come on regularly before the Court on the 9th day of May, 1949, and the plaintiff's said appeal from the said judgment of the above-entitled Court not yet having been docketed with the United States Circuit Court of Appeals for the Ninth Circuit, and no objection having been made to the granting of the plaintiff's motion and good cause having been shown why plaintiff's said motion should be granted, and the Court being fully advised in the premises:

It Is Hereby Ordered, Adjudged and Decreed That the plaintiff be and it is hereby authorized and permitted to file a cost bond on the plaintiff's appeal from the judgment of this Court, dated February 18th, 1949, to the Circuit Court of Appeals for the Ninth Circuit, pursuant to the plaintiff's Notice of Appeal filed in the above-entitled Court on March 18th, 1949.

It Is Further Ordered, Adjudged and Decreed, That the said Cost Bond be filed within ten days from the date of this order.

Done in Open Court, this 11th day of May, 1949.

/s/ CHARLES H. LEAVY,

Judge of the U. S. District
Court.

Presented by:

/s/ BURTON W. LYON, JR.,

Of Attorneys for Plaintiff.

Copy received and approved this 9th day of May, 1949.

METZGER, BLAIR, GARDNER
& BOLDT,

Attorneys for Defendants.

[Endorsed]: Filed May 11, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant, International Electric Company, intends to rely on the following points on its appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment entered in this cause on the 18th day of February, 1949, to wit:

(1) The District Court erred in holding and finding that Plaintiff was not entitled to relief in any of the respects or particulars referred to in Plaintiff's amended complaint or otherwise, and that Plaintiff's amended complaint and the above-entitled action ought to be dismissed on the merits and with prejudice.

(2) The Court erred in holding and finding that the Defendant corporation has the right to concurrently use the trade-mark "International" as applied to Electric Fence Controllers, Stock Prods, Insect and Flight Traps and Electric Heaters in the States of Washington, Oregon, Idaho, California, Utah, Nevada, Montana, Wyoming, Colorado, Arizona and New Mexico, with Plaintiff.

(3) The Court erred in holding and finding that the Defendants were not guilty of infringing Plaintiff's trade-mark "International," certificate No. 424,467.

(4) The Court erred in not allowing Plaintiff to establish a prima facie case of unfair competition because of the acts alleged in the amended complaint, and therefore, entering the finding that

the Defendants have not unfairly competed with Plaintiff.

(5) The Court erred in not sustaining Plaintiff's amended complaint.

(6) The Court erred in not granting the relief prayed for in the Plaintiff's amended complaint.

/s/ W. A. SNOW,

Attorney for Plaintiff.

Chicago, Illinois, March 16, 1949.

Copy of within Statement of Points received this 3rd day of June, 1949.

METZGER, BLAIR, GARDNER
& BOLDT,

Attorneys for Defendants.

[Endorsed]: Filed June 6, 1949.

[Title of District Court and Cause.]

STIPULATION OF PARTIES AS TO MAT-
TERS TO BE INCLUDED IN RECORD ON
APPEAL

It Is Hereby Stipulated, by and between International Electric Company, an Illinois Corporation, Plaintiff, by and through its attorneys, Rummler, Rummler & Snow and Burton W. Lyon, Jr., and International Electric Fence Co., a Washington Corporation, and George N. Hughes, defendants, by and through their attorneys, Metzger, Blair, Gardner & Boldt, that the entire record of the above-

entitled cause, including all trial proceedings, testimony of witnesses and exhibits offered and introduced in evidence, shall be included in and constitute the record on appeal.

RUMMLER, RUMMLER, &
SNOW,

/s/ BURTON W. LYON, JR.,

Attorneys for Plaintiff.

METZGER, BLAIR, GARDNER
& BOLDT,

/s/ GEO. H. BOLDT,

Attorneys for Defendants.

[Endorsed]: Filed June 6, 1949.

In the District Court of the United States for the
Western District of Washington, Southern Division

Civil Action—Number 1077

INTERNATIONAL ELECTRIC COMPANY, an
Illinois Corporation,

Plaintiff,

vs.

INTERNATIONAL ELECTRIC FENCE COM-
PANY, a Washington Corporation; and
GEORGE N. HUGHES,

Defendants.

Transcript of Trial Proceedings had in the above-entitled and numbered cause, in the above-entitled court at Tacoma, Washington, commencing at 10:00

o'clock, a.m., the 13th day of January, 1949, before the Honorable Charles H. Leavy, United States District Judge. [*1]

Appearances:

William A. Snow, Esq., of Rummler, Rummler and Snow, 7 South Dearborn Street, Chicago, Illinois; and

Burton W. Lyon, Jr., Esq., 507 Puget Sound Bank Building, Tacoma, Washington, appeared on behalf of the Plaintiff, International Electric Company, an Illinois Corporation.

George H. Boldt, Esq., and

John W. Blair, Esq., of Metzgar, Blair, Gardner and Boldt, 523 Tacoma Building, Tacoma, Washington, appeared on behalf of the International Electric Fence Company, a Washington Corporation, and George N. Hughes, Defendants.

Appearances having been noted, the following proceedings were had, to-wit: [2]

PROCEEDINGS

The Court: If there are no ex parte matters we will take up the call of the Calendar.

Docket 1077, International Electric Company, an Illinois Corporation, vs. International Electric Fence Company, a Washington Corporation, and George N. Hughes, for trial.

* Page numbering appearing at top of page of original Reporter's Transcript.

Mr. Lyon: We are ready, your Honor. At this time I would like to present Mr. William A. Snow and move his admission for practice for the trial of this case. Mr. Snow has been admitted to practice before the Supreme Court of Illinois and before the District Court of Illinois, and I move his admission.

The Court: Mr. Snow will be admitted at this time.

Mr. Snow: Thank you, your Honor. And may I, at this time, express my appreciation for the fine manner in which you were able to handle this when I was so far away and other counsel were present.

The Court: Possibly due to Mr. Snow's great distance from the Court a pre-trial conference was impossible. However, I have gone through the Pleadings quite fully and think I have a clear idea of what the situation is. The copyright involved, or the trade name, is one issued in 1947, was it? [3]

Mr. Boldt: 1946.

Mr. Snow: October, 1946.

The Court: The whole Act was amended in 1946 and became effective in 1947 by Congress. Can the parties agree whether the Act as now written applies or whether the Act as it was formerly written is the one that applies.

Mr. Snow: Your Honor, if I may clarify that slightly. This registration is granted under the Act of 1905 and is still in force and effect. The Plaintiff Corporation has filed a new application in accordance with the Federal Statute to bring this trade

mark under the new trade mark act of 1946, but at the present time that mark has not been issued under a 1946 registration. In fact, that mark is involved in several proceedings instituted by the Defendant and that is one reason why it is not issued. But, so far as I am concerned, it is immaterial whether you try the case under the Act of 1905 or under the Act of 1946.

Mr. Boldt: Well, I think counsel's statement coincides with mine to a great extent. I think there is no question but that it was issued under the Act of 1905 and in order to come under the new Act, if we may refer to the act that went into effect last year as the New Act, I think the Act itself describes certain procedures in order to place former marks under the new Act and I think the [4] Plaintiff has undertaken steps along that line but that they have never been completed due to the fact that my client is contesting it. So that, for the purpose of this case, I think we must treat the mark as one under the 1905 Act. That would be my impression of it. However, unless there is something that I haven't seen in the situation, I don't think really, as far as this case is concerned, there is any difference.

The Court: I don't think there is any difference in the right of a party who would acquire right.

Mr. Snow: I agree entirely with Mr. Boldt.

The Court: Yes. Then the other question of the affirmative defense is *res adjudicata*. There has been a brief submitted to the Court and I have gone into it and examined it quite fully. There has been

no brief by the Plaintiff in that regard so I didn't have the benefit of the Plaintiff's views. However, after an analysis of the limited pleadings that have been supplied here concerning the case tried in the State Court, I think I have arrived at some pretty definite conclusions as to whether the application for *res adjudicata* applies here.

Mr. Boldt: I don't like to interrupt but before you pass on that may I make this observation that what I had in mind was presenting that matter at a pre-trial here, at which time I would put in the record certain additional [5] material which should be before the Court in considering that issue.

We have no dispute between us about the authenticity of the material I propose to introduce and my thought was that we could treat the opening of this matter as in the nature of a pre-trial proceeding and permit me to put in my material. I think before your Honor commences you should have that material before you. That is my impression at this time.

Mr. Snow: If I may make an observation. I wouldn't want to concede that I was dilatory in this matter. On Tuesday I arrived here and at that time was handed a brief and I spent Tuesday and Wednesday running down his decisions to check on them and I had no opportunity to prepare a brief to submit to your Honor, but I did find some cases that I think are controlling in this matter and he has knowledge of those and I submitted those to him and any citations I use he will have had knowledge of them.

The Court: I was about to state that I am satisfied, from the authorities submitted and the examination made, that when a State Court does pass upon issues later involved in a contraverted case in Federal Court, the knowledge as to what constitutes *res adjudicata*, as fixed by the State applies; so that we pass over that hurriedly [6] in the first instance.

And then we come to just what that controversy covered and what this one does.

I am going to permit you, Mr. Boldt, for the purpose of the record to offer such additional evidence as you wish, somewhat in the nature now of a pre-trial conference, in support of your contentions.

Mr. Boldt: Yes. I imagine that we could have it agreed that this is now presented in the nature of a pre-trial but that it also may be considered in the record for all purposes in the case. Is that agreeable to you, Mr. Snow? We will avoid a renumbering, and so on. Is that satisfactory?

Mr. Snow: Absolutely satisfactory, with one exception, in addition he is furnishing an exact copy of the Judge's findings in the first instance and I would like to add to that matters that were not included in the judgment that belongs in there because they relate to objects attempted to be admitted in that proceeding and would have a definite bearing on the matter in Clark County and here.

The Court: I think so.

Mr. Boldt: We are starting in excellent style because I was going to suggest that if Mr. Snow had anything additional that he thought should be in

the record I would [7] give him an opportunity and he could present what evidence——

The Court: My purpose is that if this is a good defense, it would be the end of the litigation.

Mr. Snow: Yes, your Honor.

The Court: And if it isn't, we will continue with the other issues.

Mr. Boldt: We seem to agree on that too.

Mr. Snow: No arguments.

The Court: Very well.

Mr. Boldt: The first thing I would like to have the record show is that the Plaintiff corporation in the instant case, namely International Electric Company, an Illinois corporation, is the successor to the International Electric Fence Company, an Illinois corporation, named as party plaintiff in the Clark County case. That will be admitted, will it?

Mr. Snow: Yes.

Mr. Boldt: The only difference between the two being that the word "Fence" was deleted from the title of the Illinois corporation, I believe, in September of 1946?

Mr. Snow: July or August of 1946.

Mr. Boldt: Yes, July or August, of 1946, or somewhere in that vicinity of 1946. [8]

I would also like the record to show that Mr. R. H. Turk, that is, Richard H. Turk, who is named as party plaintiff in the Clark County case is the same Richard H. Turk in the instant case as assignor of the plaintiff corporation.

Mr. Snow: Correct.

Mr. Boldt: And, further, that Mr. Turk and his wife, his wife having been named party plaintiff in the Clark County case, are the principle stockholders in the Illinois corporation.

Mr. Snow: If you will qualify that, Mr. Boldt, by saying they are principles but not the sole stockholders.

Mr. Boldt: I didn't use the word "sole." I used the word "principle." Do you want to give us the exact percentage?

Mr. Snow: It isn't necessary.

Mr. Boldt: I think they own ninety-odd per cent of the Illinois corporation.

Mr. Snow: There is a discrepancy. I won't say one way or the other. There is one statement made in Clark County case and one by Mr. Turk in the discovery deposition.

Mr. Boldt: Whatever he says now——

Mr. Snow: It is over ninety per cent. [9]

Mr. Boldt: It is over ninety per cent. That is satisfactory for my purposes.

Now——

The Court: That will be considered a stipulation?

Mr. Snow: That is right, your Honor.

Mr. Boldt: I neglected to have you indicate your approval.

Now, the next thing: At the taking of Mr. Turk's oral examination it appeared that the Plaintiff corporation was in the control, or under the control, of some sort of creditors committee, or something

of that kind. Could you make a statement on that so that we will know what the facts about that are?

Mr. Snow: I don't know what bearing it has. It has no bearing, your Honor. The Plaintiff corporation is operating under Chapter 11 of the Bankruptcy Laws of the United States and the United States District Court in Chicago granted permission to the Corporation to employ me as attorney to prosecute this litigation so that their right to pursue this litigation is fixed by the District Court of Chicago.

Mr. Boldt: There is, then, a formal court order authorizing maintainance of this action?

Mr. Snow: Correct. [10]

Mr. Boldt: I am glad to accept that statement.

Mr. Snow: Further, for the information of your Honor, this is not an involuntary petition of bankruptcy, that was filed. It was a voluntary petition filed in order to protect the creditors and the Chicago Creditmen's Association of Chicago were appointed trustee and they in turn appointed Mr. Turk, the President of the Corporation, to assume full control and have all the powers that he had even prior to the filing of this proceeding so that they are operating substantially the same today as they were before. The proceedings were filed in order to protect the creditors.

Mr. Boldt: Thank you, Mr. Snow.

The point I had in mind was that I wanted to be certain that we had a proper party to maintain the action and that the adjudication your Honor makes

will be binding upon everybody. Now there is no question of the authority of Mr. Turk and the Illinois corporation; and the creditor's committee concur in authorizing the maintainance of this action.

Mr. Snow: I am sorry I can't quite agree. I don't know whether the creditor's committee would be bound by it or not. I have made the statement that, acting under Chapter 11 of the Bankruptcy Laws, the Court has given me permission to pursue these proceedings. [11]

Mr. Boldt: That satisfies me.

Mr. Snow: I don't know whether they would be bound or not. As a matter of fact, your Honor, I think we can cut this short. The proceedings under Chapter 11 will probably be dismissed before the 15th of next month since the company is out of trouble now and will be back on their feet and any decision here would be binding, Mr. Boldt.

Mr. Boldt: Thank you.

Another thing: The deposition of Mr. Bernard Soper and the pre-trial oral examination of Mr. Richard H. Turk were taken and the transcript of that testimony, in both instances, has been filed in this cause. At a pre-trial hearing it would be appropriate to have that testimony, or any part thereof pertinent, and objections made, a part of the record, and I now desire to have the Soper testimony and the Turk testimony, and any parts that the Court may find relevant and pertinent to the issues, made a part of the record.

The Court: Was Mr. Soper's testimony taken

on the theory that he would not be able to be present?

Mr. Snow: That is right, your Honor.

The Court: And to be used in the trial?

Mr. Snow: As a deposition on behalf of the Plaintiff in the trial, and the exhibits attached.

The Court: The deposition may be read in and admitted [12] as an exhibit.

Mr. Snow: Thank you.

Mr. Boldt: The purpose I had in mind is that I wanted the record to show that any or all parts of the Soper deposition, or the transcript of the testimony of Mr. Turk, that might be found relevant or material in the opinion of the Court to the issues that we want to present now may be considered a part of the record.

Mr. Snow: Yes. Yes.

Mr. Boldt: Fine.

Mr. Snow: That includes the exhibits attached to it.

Mr. Boldt: Yes, any or all parts of the deposition or testimony.

Mr. Snow: One moment, Mr. Boldt. It is here somewhere. We can find it later. The witness Soper agreed to furnish the original signed copy of the partnership agreement that he referred to in his testimony. If your Honor read it, you will recall that that statement was made.

The Court: Yes.

Mr. Snow: And up to last Friday we did not receive it and we have sent him wires and letters

attempting to find out where it is and why it wasn't sent and we have not been able to raise him on that matter. Unfortunately, [13] because of the fact he was going to transmit the original, the court reporter, in taking that testimony, did not include the document that he testified was a copy of the partnership agreement and if counsel for the Defendant has no objection, I would like to have the record show that that is a part of that deposition and included as Plaintiff's Exhibit 1.

The Court: The record may so indicate.

Mr. Boldt: There will be no difficulty on that. We will so stipulate. We would not agree that it is admissible or relevant, but we agree that it may be considered as an exhibit if found by the court to be relevant or admissible.

Why don't you make that a part of the deposition so that we won't get mixed up.

Mr. Snow: Do you have any objection, your Honor?

The Court: No.

Mr. Snow: It was identified as Exhibit 1 by the reporter.

The Court: Here it will be marked as Defendant's Exhibit A-1.

Mr. Boldt: It probably should be Plaintiff's A-1 because it was taken at the instance of the Plaintiffs.

The Court: Then it will be a straight number.

Mr. Snow: Pardon me, will you make that Plaintiff's Exhibit? [14]

The Court: The Plaintiff uses figures and the Defendant the A's.

Mr. Snow: There were three exhibits marks Plaintiff's Exhibits 1, 2 and 3 and if we have this as "1" it will be confusing.

The Court: You will have to renumber as you take them from your pleadings.

Mr. Snow: Thank you.

The Clerk: Plaintiff's Exhibit 1 marked for identification.

(Document referred to marked Plaintiff's Exhibit Number 1 for identification.)

Mr. Boldt: Now the next matter is: I have here the judgment roll in the Clark County Cause Number 22532. It is designated on the face of it as "Transcript of Certain Pleadings." It is an authenticated copy of the judgment roll in the Clark County case and I would like to have that made a part of the record. What exhibit number will that be?

The Clerk: Defendant's Exhibit A-1.

Mr. Boldt: This is Defendant's Exhibit A-1? The document just referred to is Defendant's Exhibit A-1?

The Clerk: Yes.

(Document referred to marked [15] Defendant's Exhibit Number A-1 for identification.)

Mr. Boldt: And we want that made a part of the record.

And also I have the next document marked by the Clerk as Defendant's A-2.

The Clerk: Defendant's A-2 marked.

(Document referred to marked Defendant's Exhibit Number A-2 for identification.)

Mr. Boldt: It might have been made a part of the judgment roll but it is now offered as a separate document. It consists of the transcript of the Trial Court's recommendations in ruling on the Clark County case. It is designated as "Findings" but, of course, would not technically be findings under the State Court practice; but what it is will appear from a reading of it. It is the recommendations of the Trial Court in disposing of the Clark County case and we would like that made a part of the record.

Mr. Snow: I thought you were going to have, as the judgment roll under Exhibit 1-A,—

Mr. Boldt: A-1.

Mr. Snow: A-1, to include that document as well as this document which is an excerpt that was not included in this transcript. [16]

Mr. Boldt: No; I am coming to that next.

Mr. Snow: This is in addition to this?

Mr. Boldt: That is right. A-2 is now part of the record, Counsel?

Mr. Snow: I think so.

Mr. Boldt: Now, the next item is a transcript of portions of the testimony of Mr. R. H. Turk, taken and given in the trial of the Clark County case. The transcript is certified by the court reporter and, as I understand it, counsel agrees and stipulates that this is a correct transcript of the

testimony that Mr. Turk gave insofar as it appears to be covered in the transcript. Is that correct?

Mr. Snow: That is right.

The Clerk: A-3 marked.

(Document referred to marked Defendant's Exhibit Number A-3 for identification.)

The Court: It will be admitted.

(Defendant's Exhibit A-3 received in evidence.)

Mr. Boldt: Now, the next item is one that Mr. Snow has just handed me and will be marked A-4.

The Clerk: A-4 marked.

(Document referred to marked Defendant's Exhibit Number A-4 for identification.) [17]

Mr. Boldt: Which consists of additional material appearing during the examination of Mr. R. H. Turk during the trial of the Clark County case, and other witnesses that Mr. Snow desires to have made a part of the record and to which we agree may be made a part of the record.

Mr. Snow: Yes.

The Court: It likewise will be admitted.

(Defendant's Exhibit Number A-4 received in evidence.)

Mr. Boldt: I think that includes all the items I desire to have made a part of the record at this time. Do you have need for anything further at this time, Mr. Snow?

Mr. Snow: No.

Mr. Boldt: Then with your Honor's leave, I would like to present our facts.

The Court: I would want you to be as brief as you can. I have not had an opportunity to read these exhibits but I don't want to spend the whole day upon this aspect.

Mr. Boldt: I will try.

The Court: I would like you to confine your arguments, because it seems that the same parties were involved in the litigation in the State Court at Vancouver, [18] to that proposition. The point I want to be enlightened upon is that the issues were identical issues.

Mr. Boldt: Yes. I think that that is the only question.

The Court: Insofar as it has been submitted to me, it indicates that one of the major issues there was one of contract rights and breach of contract.

Mr. Boldt: That is right. I think we can all agree and shorten it down very quickly to this: counsel will agree that the parties—that there is no question as to their being identical parties?

Mr. Snow: No question.

Mr. Boldt: And you agree also that the adjudication in the Clark County case was a final adjudication on the merits of such issues as properly within that case?

Mr. Snow: Yes. Yes.

Mr. Boldt: And you also agree that the Clark County Court had jurisdiction on such matters of the action that was before it as well as the juris-

diction of an adjudication of the right to the use of this trade name as between those parties?

Mr. Snow: No; I do not.

Mr. Boldt: All right. That is one question that we differ on.

And then the only other issue, as far as I know, is whether or not the issue adjudicated in the Clark County case would be an issue that would be present in the present case. Identity of issues, in other words.

Mr. Snow: If you will state it this way, Mr. Boldt. If the Court will find that the subject matter in the Clark County case and the subject matter before the Court in the present proceedings is the same, or of a tenor that could have been decided if such was the case, then everything else is agreed to except this one point of subject matter.

Mr. Boldt: Now I want to be sure that I understand you. The only point you raise in opposition to our contention of *res adjudicata* is that the issues now before the Court in the pending case were not within the issues adjudicated in the Clark County case; is that correct?

Mr. Snow: By that you mean they were not brought up in the Clark County case. They were not a part of the record of the Clark County case?

Mr. Boldt: I am making it as broad as I can.

Mr. Snow: I think rather than take this time of the Court, if you will limit your argument to the same line that I am going to limit mine, we can furnish this in a short period and that is if you limit it to the question of such matters.

Mr. Boldt: I suggest this. Perhaps you better make your statement and let me reply. That might be helpful because I don't want to cover points that you concede.

Mr. Snow: You won't. If you do, I will stop you.

Mr. Boldt: All right.

Now, your Honor, the thing that questions me is that Mr. Snow suggests that he raises some question about the jurisdiction of the Clark County Court to adjudicate the right or use of trade mark, or trade name, as between these parties. I cover that, and I don't think there is any question at all, or contrary authority, to the proposition that the State Court had concurrent jurisdiction with the Federal Court in determining the right or use of trade name.

Is your Honor in doubt about that issue?

The Court: No, I am not in doubt on that issue; but I am about whether or not it was an issue involved in the case.

Mr. Boldt: I understand that. I will not talk about the jurisdiction then, because your Honor presently views it as I do, and if Mr. Snow has anything to the contrary, I can reply to that.

Now, as to the identity of subject matter. There is just a sentence or two that summarizes the whole picture. It is from American Jurisprudence, and I think I can read it in four or five sentences.

Mr. Snow: What section? [21]

Mr. Boldt: Section 178.

The Court: What volume?

Mr. Boldt: Thirty. American Jurisprudence. Section 178, page 920 and following pages.

“It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res adjudicata* and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action, whether the subsequent action involves the same or a different form of proceeding, or whether the second action is upon the same or a different cause of action, subject matter, claim, or demand, as the earlier action. In such cases, it is also immaterial that the two actions are based on different grounds, or tried on different theories, or instituted for different purposes, and seek different relief.”

Section 179: “The phase of the doctrine of *res adjudicata* precluding subsequent litigation of the same cause of action is much broader in its application than a determination of the questions involved in the prior action; the conclusiveness of the judgment in such case extends not only to matters actually determined, but also to other [22] matters which could properly have been determined in the prior action. This rule applies to every question falling within the purview of the original action, in respect to matters of both claim and

defense, which could have been presented by the exercise of due diligence.”

Section 180: “The rule granting conclusiveness to a judgment in regard to issues of fact which could properly have been determined in the action is limited to cases involving the same cause of action. Where a second action is upon a different claim, demand, or cause of action, the established rule is that the judgment in the first action operates as an estoppel only as to the points or questions actually litigated and determined, and not as to matters not litigated in the former action, even though such matters might properly have been determined the rein.

Accordingly, before the doctrine of *res judicata* is applied in such cases, it should appear that the precise question involved in the subsequent action was determined in the former action.

These rules prevail whether the judgment is used in pleadings as a technical estoppel, or is relied on by way of evidence as conclusive *per se*.” [23]

Now, from all that, if your Honor please, you get this proposition that where the cause of action in the prior—in the first case—is the same as in the second case, then the judgment precludes—includes—not only the matters that were actually decided by the court in the previous case but all that might have been decided.

In other words, to illustrate, in an action for divorce the plaintiff alleged cruelty, and incompatibility, if that were a ground, and there was an adju-

dication of that issue against the plaintiff, and the plaintiff then commenced another action on some other grounds; now, in such an instance, because it is the same cause of action, namely an action in divorce in the marital relationship, why, the first judgment would be preclusive of the second one, even though no mention was made in the first action of the ground asserted in the second action.

Now, such is the situation where we have identity in cause of action. Now, in the other instance, we have a situation where there is not identity of cause of action, where in the one case we will say it was a suit for divorce and in the next instance it was a suit of a property settlement between husband and wife. It is the same type of illustration. Now, in such a situation, there being no identity of cause of action, it being related to something entirely different, perhaps anything unrelated to their marital status in that case, the only issues that would be determined in the first instance, and the only ones which would be precluded in the second, would be those actually inherent and determined in the first action.

Now, I think we all agree up to this point in my presentation of that matter. Now, in the instant case it is our contention that the cause of action is identical and also, if it be said otherwise, that in any case the identical fact shown upon which the action must hinge, was decided adversely to the plaintiff in the Clark County case.

The Court: Mr. Boldt, the action in the Clark County case was an action at law, was it not?

Mr. Boldt: No. It was an equity action.

The Court: Tried to a jury?

Mr. Snow: Tried before Judge Cushman.

Mr. Boldt: There was no jury.

Mr. Snow: It was an equity case.

The Court: Very well.

Mr. Boldt: It was an equity case. I am going to get to that.

The Court: I don't want you to spend too much time on this.

Mr. Boldt: No.

The Court: Half the day will be gone and we will not be to the merits of this case. [25]

Mr. Boldt: The test of determining whether the cause of action is identical, which has been enunciated by our own Washington Court, and stated in Section 174, is, to get right down to it, if the same facts or evidence would sustain both the two actions, the judgment in the former is a bar to the second action.

In other words, if the same evidence would support the one case, and is the same, then there is an identity of cause of action, regardless of whether in the one you pray for this or that in the other. What you pray for has nothing to do with it; and if the allegations and issues could be supported by identically the same evidence in the second, then there is deemed to be an identity of cause of action.

Now, getting to the question that you asked. In the Clark County case, among other things it was

alleged basically that Turk and Hughes had made a deal for the purchase by Hughes of the stock of Turk in the Washington corporation, which is now Defendant in this action. In his complaint, his second amended complaint—and in the first one, too, but the second one is the one we are controlled by—in the second one, is alleged the transaction by which Hughes controlled the stock, that the contract was violated by Hughes and for that reason Turk sought a revision; they sought an adjudication that Hughes had breached the contract, [26] and that by reason thereof they were entitled to a rescission of the transaction whereby Hughes acquired the stock. It is a very long, rambling complaint, but in paragraph one it is alleged, by the addenda attached to it, that it was further agreed between the parties that Hughes and wife were to purchase and merchandise for the plaintiff, and sell such merchandise, under plaintiff's trade name, International Electric Fence, in Oregon and Washington, and so on. In paragraph three it was alleged that sometime prior to October 9, 1941, being the date of incorporation of the defendant corporation, Hughes, who had been a former employee of the plaintiff's, that at the time of the sale of the International Electric Fence Company, had sales rights only in Oregon and Washington. In paragraph five, among other things, that as a part of the consideration International Electric Fence Company, Inc., a Washington corporation, was to be dissolved and disincorporated by Hughes and limited to sales

of International Electric Fence units and that Hughes was to cease transacting business under the name of International Electric Fence Company, Incorporated. Now, in paragraph six, they were—yes—they were to purchase their merchandise from International Electric Fence Company, owned and yes—they were to purchase their merchandise from chandise in Oregon and Washington and not in any other territory of the United States. Now, [27] in paragraph seven, and here is the particular one, it is alleged that the defendants breached agreement entered into in the following particulars, to wit: one, that they failed to disincorporate the International Electric Fence Company, Inc., a Washington corporation. Two, that they failed to deliver. Three, that the defendants failed to purchase merchandise from the plaintiff and instead purchased merchandise from electric service systems and further sold such merchandise under plaintiff's trade name, and; four, that they failed to confine their activities to Washington and Oregon. Five, that the defendants registered their corporate trade name which was an extension of their activities in failing to disincorporate. Six, that the plaintiffs circulated to defendant's customers in Oregon and Washington claiming that they were the original electric fence company and that the plaintiffs were imposters. Paragraph eight, among other things, they also knew at that time that it was Turk's intention to register the name of International Electric Fence Company. That this was

discussed by them and that they deceived the plaintiff until they made arrangements to secure similar merchandise which the defendant had manufactured for them by electric service systems which were sold by defendant under name of International Electric Fence Company, in violation of the agreement with plaintiff; that the defendants have advertised [28] their business under the name of International Electric Fence Company.

Now, those were the allegations of the Complaint. It is perfectly plain that within the allegations of the Complaint the use of the name "International" by the Defendant was then is issue before the Court.

Now, in the proof that was given in support of it, as will be shown here, Turk testified in considerable detail concerning his claim, or assertion, about what that contract and agreement was, and that Hughes was required to discontinue the use of the name and that he had registered the name in the United States Patent Office and that he was the owner and holder of it, and so on.

Clearly, the issue was within the pleadings.

Now, actually, what the thing boiled down to is this. In the Clark County case Turk claimed a breach of contract for several reasons, three of which were—and actually the basic one of them all was—the use by the Defendant of the name "International," both for the name of their company and for the name of their product. That was the basic issue that Turk took into court, that Plaintiffs took into Court in the Clark County proceedings.

The fact that they may have persuaded the Court in their views, we are not concerned with that. Now, the use of the name was actually mentioned by the Court in disposing of that case. [29] For, in the record now before your Honor, Judge Cushing, among other things, said—he was discussing the evidence—turning to page four, or perhaps, we better start with page three—on page three, about ten lines down, there is a sentence of the Court's remarks in which he says, "Now it is true, counsel for the plaintiff has something in mind that they are trying to put it over to the Court. The court feels at that time"—the time when Turk sold his stock—"Mr. Turk had something in mind." That same matter is referred to on the next page, page four, where the court says, about ten or twelve lines down, "The only reason given here at the trial, and that is what the Court must be governed by, was because Mr. Hughes stated he would disincorporate to save these corporation taxes. He thought it was to his best interest to disincorporate. Nothing was said by Mr. Turk at that time if Mr. Hughes disincorporated he could no longer use the name. I am sure that is what counsel had in mind all during the trial and Mr. Turk had in mind all during the trial. The court cannot go by that. The court must go by what was said. What was agreed on." And then the court goes on to talk about the dealers and says, "It was made plain by counsel and Mr. Turk that what was agreed was Mr. Turk was limiting Mr. Hughes so far as the

sale of International Fence Company products were concerned to the States of Oregon and Washington, excluding certain counties therein." And then he winds up and says at the end of page five: "So, the court feels then that if there was a breach of contract, and the court does feel there was a breach of contract, the breach occurred on the part of Mr. Turk. He refused to sell merchandise to Mr. Hughes, that is, unless Mr. Hughes agreed to do something other than he agreed to do on July 1, 1944." "Counsel for the defendants asked Mr. Turk whether or not there was any agreement as to the length of time the buying and selling would run and Mr. Turk said there was no agreement as to length of time." "Clearly, any such agreement would be void as part of an agreement in restraint of trade."

Down at the bottom of the page:

"The evidence clearly shows Mr. Hughes did not sell outside of the territory he was limited to until after Mr. Turk refused to sell him any more merchandise.

"The court feels that after he notified Mr. Hughes that his agency or dealership was cancelled that he would make arrangements to give the territory to somebody else, the court feels then that Mr. Hughes was justified in stating as he did in Plaintiff's Exhibit 27 that he would thence forward buy at the best price wherever he could, and, it seems it would follow he would sell at the best price or wherever he could.

"Most assuredly Mr. Hughes could not abide by

the agreement and pay the one-third more on the price or [31] fifty per cent of the list price unless Mr. Turk would furnish the merchandise.

“Therefore, the court feels in that respect the breach arose on the part of Mr. Turk rather than Mr. Hughes.”

If I can summarize the basic issue in the Clark County case:

It was an alleged breach of agreement because of the alleged violation by Hughes of the corporate name and the use of the word “International” on the product.

On that basic issue, the court held against Mr. Turk and held against the plaintiff, and that is the identical issue your Honor will spend a couple of days listening to here.

The Court: I don’t know if I will spend a couple of days listening to it.

Mr. Boldt: If our position is overruled, that is what will happen, because you will have to determine whether or not there was an agreement by Hughes and Turk as concerned that name, and that will involve identically the same testimony.

Turk will get on—and he started in the same position in the deposition to tell the same story as he did in Clark County about supposed and alleged agreements with Mr. Hughes. [31a]

That issue is a little bit difficult to see, but that is exactly what it is.

In the present case, the whole issue, aside from res judicata, will be who, between these two peo-

ple, had the superior right, or what were the nature of the rights, of the use of that name as between them.

That is the issue in this case and the only issue and that was the very issue that the Clark County case was decided on.

The Court: Mr. Boldt, I am going to have to strike from this affirmative matter in your answer the issue of *res judicata* and I am not going to elaborate to any great extent upon it.

But, after listening to your argument, and glancing through the oral pronouncement eventually made by the court at the conclusion of the plaintiff's case, and particularly the formal order of dismissal which became a final judgment in that case, the issue now before the court as to who is entitled, as a matter of right, to use the trade name only was an incident in the litigation.

It wasn't an issue that probably could be made the basis of a decision in that case.

That merely arose incidentally because that was an action for rescission of contract, an alleged [32] breach and an action in equity, and was not determinable of the issue made here and was not brought clearly into the case. I am conscious of the fact that the cases are legion on the subject of *res judicata* and they shade off greatly and the Supreme Court of this State has laid down what the elements are, so far as the State is concerned, and those elements are essential, of course, and binding upon this Court, and they must be four in number, and

I take it that there is one of them that is sufficiently lacking that it would doubtless be error on my part to hold that there was a determination made, or that there could well have been a determination made, on the question of who is entitled to this trade name. I would be, perhaps, a little influenced by the testimony by this witness, Soper. He indicates that that was his trade name and I don't know whether he gave it to anybody or whether he still is giving it to anybody that buys a product and puts that stamp upon it. His testimony is a little vascillating in some regards, but you could well think that it was a great question of whether he ever gave it up and whether either of the parties here have a right to it, so that we can simmer this case down to the single issue of whether or not the plaintiff or defendant have an exclusive right to use this trade name or whether they have a joint right to the use of it, and so we will, in proceeding with the trial, eliminate the issue of *res judicata*; and I [33] will allow you an exception to the Court's ruling.

Mr. Boldt: I didn't ask for an exception but I want to, if I may, call your attention to section 183, American Jurisprudence, on this matter: ". . . the doctrine . . . is not confined to ultimate vital points decided in the previous action, but may extend to incidental questions. . ."

The Court: That is true, but I think you will find many cases in which they lay down the further rule that the rule of *res judicata* must be rather liberally construed.

Mr. Boldt: Oh, yes.

Mr. Snow: Correct.

Mr. Boldt: I suggest that you don't eliminate the issue from the case but keep it in mind until your final determination.

The Court: I feel I must rule upon it because if I do not now, I have the problem to confront me all through the case and it is one that should be determined at this stage of the case, and I do so determine. So, then, we shall proceed to the trial unless there are some further facts now that can be agreed upon.

Can you agree upon certain facts that involve dates that become highly material in this matter?

Mr. Boldt: I think we might very well do that, your Honor. I presume it will be Mr. Snow's place to go further with that. [34]

The Court: Yes. I know that that would be very helpful to the Court in——

Mr. Snow: If your Honor please, if I may state—Mr. Boldt, will it be agreeable to you that it will be stipulated that these are facts——

Mr. Boldt: Let's go in chronological order, if you can.

The Court: Yes.

Mr. Snow: In the year 1938——

The Court: Pardon me. Does the manufacture of this appliance go back to about 1933?

Mr. Boldt: Not that long.

Mr. Snow: 1938, your Honor, is the date we are using as the original date.

The Court: I would like to have you agree, if you can, when this type of an appliance——

Mr. Boldt: Oh, yes, this type of product.

The Court: He began manufacture of it in 1933?

Mr. Boldt: No; 1938.

The Court: Or assembling it; or whatever it is.

Mr. Boldt: Mr. Turk and Mr. Soper, working for other electrical concerns, were in this general field. Now, whether this particular type of a device was manufactured——

Mr. Snow: Your Honor, may I make this observation, please. Mr. Soper and Mr. Turk were both selling the [35] device involved in this proceeding, the general type of device, electrical fences and control rods and other equipment that were manufactured prior to 1938 and during the year 1938——

The Court: And their association began on what date?

Mr. Snow: 1938. Mr. Turk, would you stand up and verify these dates in the event they are wrong?

Mr. Boldt: This is not testimony.

The Court: I think we can perhaps save time on this.

Mr. Snow: The issue of Mr. Soper and Turk took place in the year 1938.

Mr. Turk: No. 1936, we worked——

Mr. Snow: 1936 they worked together; worked together, they were not associated in business.

The Court: I want to get the date when they met and began working in this particular field.

Mr. Turk: 1936.

Mr. Snow: 1936. And that was in Oregon.

Mr. Turk: No; Stockton, California.

Mr. Snow: In connection with the selling and the assembly of equipment known as electric fences and stock rods and shock controls.

Mr. Turk: It was sales of that type of equipment. [36]

Mr. Snow: The next date is 1938, your Honor, when Mr. Turk and Soper were both—prior to 1938, they were both independently selling this same type of merchandise that was manufactured by one Mitchell.

Mr. Boldt: That is the way I understand it; I don't know.

Mr. Snow: And that after—during the year—1938, Mr. Soper and Mr. Turk formed a corporation in the State of Oregon under the name of International Electric Fence Company.

Mr. Turk: Incorporated.

Mr. Snow: Incorporated.

Mr. Boldt: That is correct.

Mr. Snow: For the purpose of selling—

The Court: Could I interrupt. Can you further stipulate then that that was the first time, if it was, that the word "International"—

Mr. Boldt: So far as these parties are concerned, yes, your Honor, that is the first time the name "International" was used.

Mr. Snow: During the year 1938.

The Court: Very well.

Mr. Snow: Then during that arrangement, the Oregon corporation—they were selling devices of the same character on the West Coast, and elsewhere where they could, manufactured by one Mitchell. Mr. Mitchell's devices were of poor quality and construction and the Oregon corporation was getting so many complaints and so many devices sent back for repair and replacement that they decided that was a very poor proposition, with the result that the Oregon corporation, towards the end of 1938—no, towards the beginning of 1938, right after it began, in the spring, ceased to do business as such. This is contained, by the way, your Honor, in the deposition of Mr. Soper. At that time Mr. Soper came to Chicago to manufacture—he went to Chicago to manufacture electric fences and fence equipment. Mr. Turk continued with that corporation until the fall of 1938 when he found that it was useless to continue selling the Mitchell device because he was doing so at a tremendous loss.

He moved to Vancouver, Washington, in the fall of 1938, where he established the International Fence Company, a business operated by himself. In other words, he was doing business as International Electric Fence Company, and at that time that name was recorded by him under the State's fictitious or assumed name act.

Mr. Turk: That is right.

Mr. Boldt: That would be with the Clerk of Court of Clark County.

Mr. Snow: Yes. In March or April, 1940.

The Court: What happened during 1939? [38]

Mr. Snow: Mr. Turk was operating as an individual doing business as International Electric Fence Company, selling these same units.

Mr. Boldt: And manufacturing to some extent.

Mr. Turk: Yes; I had a man hired to produce for me.

Mr. Boldt: A man by the name of Good.

Mr. Turk: That is right.

Mr. Boldt: Was manufacturing these at Vancouver under the name of International.

Mr. Turk: About four or five hundred units.

Mr. Boldt: Four or five hundred units that Good manufactured for Turk in Vancouver, labeled them International——

Mr. Snow: In 1939.

Mr. Turk: No; even in 1938 we produced them.

Mr. Boldt: To summarize the thing then, Mr. Snow——

The Court: Let's have Mr. Snow proceed, except can you stipulate so far as the facts that he has stated?

Mr. Boldt: Yes. I was going to add at this point that we will offer, between the years 1938 and 1941, when the Washington corporation was organized, that both Soper and Turk were engaged in the manufacture of these units under the same name "International." [39]

The Court: And Mr. Hughes wasn't in the picture?

Mr. Snow: No.

Mr. Boldt: That is right.

The Court: All right. In 1940, what was done?

Mr. Snow: I think it will be a contested fact, so that I would like to make a statement and, if there is no objection, we do not have to prove it.

When Mr. Turk and Mr. Soper decided to forego the Oregon corporation, and Mr. Soper went to Chicago, it was generally agreed at that time that Mr. Soper would go to Chicago for the purpose of manufacturing these units, that he would send them out to Mr. Turk, and Mr. Turk would have the exclusive right to sell these units in the twelve Western States. That is contained in the testimony, I am sure, of Mr. Soper.

Mr. Boldt: Well, the arrangement between Soper and Turk we couldn't stipulate. Any oral arrangement. We would take the position that it would not be admissible, any oral understanding, between them, as far as this case is concerned.

The Court: Very well.

Mr. Snow: That was in 1939; I am sorry.

The Court: But you will offer evidence to that. I understand it is going to be controverted.

Mr. Snow: That is why I made the statement.

The Court: It is either controverted or the admissibility will be questioned.

Mr. Boldt: It is controverted by what already has happened—Mr. Turk says he manufactured four

or five hundred at Vancouver during that same period.

Mr. Snow: That doesn't enter the picture, but we won't argue.

The next thing is in October.

The Court: What year?

Mr. Snow: 1941, when Mr. Turk and Mr. Hughes, the defendant, became business partners and formed or had formed the——

The Court: Is this the first meeting of these two men?

Mr. Snow: No; we had that previously. In March, 1940, Mr. Hughes was employed by Mr. Turk as a bookkeeper.

The Court: No; we hadn't had that.

Mr. Snow: I thought I mentioned that. I am sorry.

Mr. Boldt: You didn't mention it.

Mr. Snow: I am sorry.

Mr. Boldt: I probably interrupted you and got you off the track.

Mr. Snow: Then Mr. Hughes was still his bookkeeper until October, 1941, when the Washington corporation, [41] known as International Electric Fence Company, Incorporated, was formed, and the stock was divided, two hundred shares to Mr. Turk and his wife and two hundred shares to Mr. Hughes and his wife. Four hundred shares total. Do you agree there?

Mr. Boldt: Yes; that is correct. Hughes paying them consideration for it.

Mr. Snow: There is no argument about that.

The Court: That was adjudicated in the Clark County Court and is not involved here.

Mr. Snow: No; that is right, your Honor. The next date is June, 1943.

Mr. Boldt: I would like to suggest a prior date, if I may.

Mr. Snow: Surely.

Mr. Boldt: On June 1—between October, 1941, and June 1, 1943, the fences were manufactured under this same name “International” and by Mr. Soper for the Washington corporation, and that during all that period, the Washington corporation was owned, fifty per cent by Mr. Turk and his wife and fifty per cent by Mr. Hughes and his wife.

Mr. Snow: That statement is correct, your Honor; but, that would mean—that statement—exclusively for the Washington corporation. He manufactured them for other regions in the United States and also for the Washington corporation for distribution.

Mr. Boldt: That is right.

Mr. Snow: That was June 1, 1943.

Mr. Boldt: To June 1, 1943.

Mr. Snow: That is the next date I have in mind, your Honor. On June 1, 1943, because of the fact we were engaged in the Second World War, electric fences were not considered essential items for the war effort and the allocation of the materials in this line was extremely limited and, since the manufacture was taking place in Chicago, Mr. Turk, with the agreement of Mr. Hughes, came to

Chicago for the sole purpose of seeing what could be done to increase the amount of fencers and controllers that could be sent to the Vancouver office for sale, because they were extremely limited due to the shortage of materials.

As a result of Mr. Turk's trip to Chicago, and conferring with Mr. Soper went and he and Mr. Turk entered into a partnership for the manufacture of electric fencers here in Chicago under the same name. Mr. Soper had been operating under the International Electric Company. In order to get around this matter of getting more materials so that they could manufacture, the partnership purchased at that time the Electric Service System of Minneapolis, Minnesota, for quite a large sum of money, and Mr. Soper was put in charge of that office and Mr. Turk had [43] charge of the Chicago office of that partnership. As to the matters that transpired and how they divided their income, and so on, I don't think that has any bearing except that they became partners and had the Minneapolis concern and the Chicago concern and they still maintained and owned one-half of the corporation. That is June 1, 1943.

Mr. Boldt: And he was receiving his full salary as an officer of the Washington corporation, or it was being credited to him and will ultimately be collected.

Mr. Snow: There is nothing wrong with that statement, your Honor.

Mr. Boldt: That is a fact.

The Court: Well, I won't make that a finding here, the collection of it.

Mr. Snow: I approve the second half of his statement—that it is credited to him.

The Court: There are other elements that I would like to have you either agree or disagree on, and that is, when Mr. Turk went to Chicago and made the arrangements with Mr. Soper, did he and Soper, as a partnership, buy up some concern in Minneapolis?

Mr. Snow: Electric Service Systems.

The Court: That one of the considerations passing between the parties was a transfer by Mr. Turk of fifty per cent of his interest in the Vancouver corporation? [44]

Mr. Snow: We will agree with that. I didn't want to go in to that, but that is a fact.

Mr. Boldt: That is right. However, it should be further added at that point that that was wholly without the knowledge of Mr. Hughes and further that the stock was supposed to be exchanged and never actually was and on the books of the company here in Washington, Mr. Soper never became a stock holder and never was a certificate made.

The Court: I don't know if you want to stipulate to that.

Mr. Snow: No, sir. That is controverted and will have to be proved, if it is material, and I do not believe it is at the present time.

The Court: The Court has this in mind, in asking that, that it will become rather material as to

who has a prior right to this trade name as to when Mr. Turk went from Vancouver to Chicago to get further products for the corporation to sell, was he acting for and on behalf of the corporation or for and on behalf of himself.

Mr. Boldt: That is why I called your attention to the fact that he remained president of the Washington corporation at that time.

The Court: I don't want an argument but to ask you to stipulate what you can.

Mr. Snow: The trip to Chicago was with the approval [45] of Mr. Hughes. I believe that is true, Mr. Boldt.

Mr. Boldt: Yes, for the purpose of expediting the flow of materials to the Washington corporation.

Mr. Snow: I don't believe that the Defendant will agree to this statement, your Honor, but I would like to express it and if he has any objection, it will have to be proved.

The Court: Very well.

Mr. Snow: That one—that another—reason for going to Chicago was to speed up production because Mr. Turk had been servicing other states outside of the States of Washington and Oregon and he went down there to get additional materials as well as for the Washington corporation.

The Court: I assume that that will be controverted.

Mr. Boldt: That may have been his purpose but not the purpose of the Washington corporation.

The Court: That will be a question that you can offer proof on.

Mr. Snow: Now, does your Honor have any other matters up to this point?

The Court: No. No.

Mr. Snow: Now, on June 1, of 1944, just one year after the formation of the partnership in Chicago between [46] Turk and Soper, the partnership was dissolved.

The Court: That was the Turk-Soper——

Mr. Snow: The Turk-Soper partnership in Chicago. At which time, as part of the split up of the assets of the partnership, Mr. Turk turned over the Minneapolis plant, the Electric Service Systems Company plant, to Mr. Soper, and Mr. Soper turned over the Chicago office in its entirety, known as International Electric Fence Company, to Mr. Turk and at the same time retransferred the one hundred shares of stock in the Washington corporation that he had given to Mr. Soper as part of the consideration of the partnership that was formed.

Mr. Boldt: That is correct excepting the retransfer of stock. You don't mean that there was actually any transfer of certificates or delivery of papers or anything else. It was an oral understanding that the stock which he previously should have transferred would not now be required to be transferred; is that correct?

Mr. Snow: Not quite that way.

The Court: State the facts, if you can agree upon them. If your client states that he had stock

certificates and had them transferred, even though it was not recorded on the books,—

Mr. Snow: As a matter of fact, your Honor, the stock certificates were never actually delivered by the corporation [47] to Mr. Turk up to the present time. They are still in the books of the corporation, but it was agreed between the two—they were two men who had been doing business for some time and both had full faith in each other.

Mr. Holdt: That is beside the point.

The Court: At the time of the Vancouver corporation, each subscribed to fifty per cent of the shares?

Mr. Snow: Four hundred shares.

Mr. Boldt: Two hundred each.

The Court: The whole stock was four hundred?

Mr. Boldt: Yes.

The Court: And do you agree further that there was never a stock certificate issued, or that there was one made but—

Mr. Boldt: No. The stock certificate was delivered. He has forgotten the fact that he had to procure it from some source back east. It was in hock. The stock certificate was issued and we have the cancelled ones.

The Court: I think you can expedite the matter quite a bit if you can agree to the matter, as to those facts.

Mr. Snow: Well, my client, your Honor, does not seem to recall that statement he just made about putting it in, quote hock, unquote.

Mr. Boldt: I didn't say that for any reason but [48] that I am trying to recall Mr. Turk's mind.

The Court: If you have it there, can't you all agree and see if it is correct.

Mr. Snow: All right, your Honor, we will agree that Mr. Turk and his wife, Phyllis Turk, each had been issued, 198 to Richard H. Turk and two shares to his wife, Phyllis Turk, and that the stock probably was in the possession of Mr. Turk.

Mr. Boldt: Do you want to staple them together and admit them?

The Court: Exemplified by the stock certificates marked——

Mr. Boldt: Staple them together and mark them as one exhibit.

The Clerk: Defendant's Exhibit A-5 marked for identification.

(Documents referred to marked Defendant's Exhibit Number A-5 for identification.)

The Court: All right. Now then, we are down to 1944.

Mr. Snow: We are up to June 1, 1944.

The Court: Yes.

Mr. Boldt: That is right.

The Court: Now, what occurred there?

Mr. Snow: On June 1, 1944, the partnership in Chicago [49] between Soper and Turk was dissolved.

The Court: Yes.

Mr. Snow: That occurred on June 1. And on this other matter, with reference to the statements

which Mr. Turk had given to Mr. Soper as part of his purchase price in the assets he was contributing to the partnership, they were returned to him.

The Court: It was agreed there was no formal transfer of stock on the stock records.

Mr. Turk: Yes.

Mr. Snow: Just a minute.

The Court: That is right. There was no formal transfer. Now, is it agreed further that when Soper dissolved this partnership with Turk, that Soper was to continue to manufacture these fence appliances bearing the trade name "International"?

Mr. Snow: Is it agree?—I am sorry, I was lost there.

The Court: Is it further agreed that on June 1, 1944fi when the partnership between Soper and Turk was dissolved, that Soper was to continue in the manufacture of the electric fences using the name "International"?

Mr. Snow: He hadn't used the name "International" at all in Minneapolis. That company was known as the Electric Service Systems. [50]

The Court: I am probably going back to Soper's evidence that he did and put this stamp or label on it.

Mr. Snow: This is a little bit confusing, your Honor. I can make this statement and I believe counsel will agree with me, in view of Soper's testimony. Mr. Soper, as a member of the partnership, did make at Minneapolis the electric fences and electric fenceer equipment involved and shipped them

from there under the name of International Electric Fence Company directly to distributors where there was a savings in shipping and freight rates, such as Mr. Clint, and to the Washington corporation, but the invoices came to Chicago, to the International Electric Fence Company. I am talking now up to and including June 1, 1944. The Chicago company, International Electric Company, invoiced that equipment to Clint and the Washington corporation. Now, when the partnership dissolved, there was a gentleman's agreement—there was nothing in writing—between Turk and Soper that Mr. Soper would continue——

Mr. Boldt: Now we would object to that as being wholly inadmissible. A gentleman's agreement between Soper and Turk, that could have no bearing on Hughes.

The Court: So that after June 1, 1943, the partnership was dissolved and what further relationship was there between these parties?

Mr. Snow: There is only one further period, from [51] June 1, 1944, to July 1, 1944, when in that period Mr. Turk sold his stock, and his wife's stock, two hundred shares in the aggregate, to Mr. Hughes.

The Court: What date?

Mr. Snow: July 1, 1944.

Mr. Boldt: That is shown by the cancellation mark on the stock certificates now in evidence. The assignment is on the rear—on the reverse, I should say.

The Court: Yes.

Mr. Boldt: I should mention, your Honor, that transaction of July 1, 1944, was one with which the Court and the parties were concerned in this Clark County case.

The Court: I assume it was.

Mr. Snow: I am not trying to confuse anything. I am trying merely to put in the facts that we can agree to and we can shorten the trial considerably.

The Court: I think we have made some progress. I would like to have you go on a little bit farther. That will be left as a matter in issue. But, when these stock certificates were transferred back from Hughes—or from Turk to Hughes, Turk and his wife to Hughes, is there any documentary proof as to any understanding that was had between the parties?

Mr. Boldt: No.

Mr. Snow: Only insofar as letters that were written [52] by Mr. Hughes.

Mr. Boldt: Some letters were written back and forth between the parties that I think might be contended would have some bearing, but they were all admitted in evidence. I think they were admitted. They have a stamp on them, from the Clark County case, but what you have in mind is, was there a formal contract. There was not.

Mr. Snow: No formal contract.

The Court: Anything limiting territory or type of merchandise or anything?

Mr. Boldt: Nothing.

Mr. Snow: Oral only, your Honor.

The Court: I see. Of course, you can't stipulate upon that.

Mr. Snow: I believe, though, that Mr. Boldt will stipulate that prior to 1944, July 1st, the Washington corporation did not manufacture any electrical fencer equipment.

Mr. Boldt: I don't believe that the Washington corporation did manufacture any. That is correct.

Mr. Snow: July 1, 1944.

Mr. Boldt: Excepting, of course, that its predecessor in interest, Mr. Turk, manufactured in Vancouver during the time that Mr. Hughes was familiar with it. That was already brought out.

The Court: Well, you can stipulate to these facts, that Mr. Turk, on a certain day, applied for a registration.

Mr. Boldt: That is admitted in the pleadings.

Mr. Snow: That is admitted, your Honor, and I think it might be well at this time Mr. Boldt if you have no objection that we introduce in evidence a copy of the certificate of registration attached to the Bill of Complaint in this matter 42467 attached to the complaint and marked as plaintiff's exhibit 1.

Mr. Boldt: Yes, I have no objection to that, if your Honor please.

Mr. Snow: And as exhibit 2, a copy of the assignment from Mr. Turk to the Washington—

The Court: They will be taken from the files and marked in that manner and admitted.

Mr. Snow: Thank you. And the assignment, June 10, 1947, from Richard H. Turk, doing busi-

ness as International Electric Fence Company to the International Electric Company a corporation of the State of Illinois and have that marked as Plaintiff's Exhibit 2.

The Court: It will be about the first document in the files will it not? It will be taken out and marked and made a part of the record.

Mr. Snow: And that copy will be subject to checking [54] with the original as to errors.

Mr. Boldt: That is agreeable.

The Court: And you are offering the assignment?

Mr. Snow: It is attached, your Honor.

The Court: I see.

Mr. Snow: And also——

The Court: Now, before you go farther, can it be stipulated, if it should become material, that the Plaintiff in this action is a corporation controlled by Mr. Turk and his wife?

Mr. Snow: I thought we had stipulated to that.

Mr. Boldt: That he owns ninety per cent of the stock.

The Court: That is right.

Mr. Snow: I would also like, if I may at this time, to introduce as Plaintiff's Exhibit 3, the notice attached to the Bill of Complaint, dated May 26, 1947, written by the firm of Rummeler, Rummeler and Snow, addressed to the International Electric Fence Company, Vancouver, Washington, charging them with infringement of the trade mark "International."

Mr. Boldt: There is no objection to your iden-

tification of it. Whether it would be material or not is another matter.

Mr. Snow: I am asking that it be admitted. [55]

Mr. Boldt: I think I have no objection.

Mr. Snow: Then if I may, there are a few other things I think could be stipulated to here, because they were substantially admitted in the Answer and that is that the Plaintiff is an Illinois corporation having its principal place of business in Chicago.

Mr. Boldt: I think that has been already admitted.

Mr. Snow: I think it has by the Answer but these are stipulated admitted facts and it might be well to let the Court have the advantage of that.

Mr. Lyon: That the International Electric Fence Company, Incorporated, is a Washington corporation, and the Defendant George N. Hughes is an individual residing at Vancouver, Washington, and owns a substantial part of the stock of the International Electric Fence Company.

Mr. Boldt: That is correct.

Mr. Snow: Would you be willing at this time to tell the Court approximately the stock ownership by Mr. Hughes and his wife?

Mr. Boldt: Approximately seventy-five per cent is owned by Mr. Hughes and his wife and the rest by Mr. Hughes' children—sons and daughter of his.

Mr. Snow: And, that this Court has jurisdiction of the parties and subject matter. [56]

The Court: Yes. I don't think you need to stipulate to that because the court has taken jurisdiction whether it has or not.

Mr. Snow: That Plaintiff and its predecessor in business adopted and used the trade mark "International" on fences and insect and fly traps and electric heaters.

Mr. Boldt: That, of course, is one of the issues in the case. I think we better leave that to determination.

The Court: Yes.

Mr. Snow: Could we leave the word "adopted" out?

Mr. Boldt: I think we better let it out until the matter is concluded. You can't say yes or no to that.

Mr. Snow: All right. Will you admit that the Defendant Hughes, being the principal stockholder of the International Electric Fence Company, is the sole director of the policies of the corporation?

Mr. Boldt: I am not clear what you have in mind.

Mr. Snow: In other words, Mr. Hughes——

Mr. Boldt: I couldn't stipulate to that. I have already stipulated that Mr. Hughes is the principal stockholder and I think that is as far as I could go.

Mr. Snow: All right. I don't know at this time, your Honor if there is anything else I have in the way of a stipulation.

The Court: Very well. I will hear from the Defendant. [57]

Mr. Boldt: I am not going to repeat.

The Court: No.

Mr. Boldt: I think perhaps, it will be advise-

able to have a copy of the articles of incorporation. This is an original executed copy. Mr. Turk's signature, and that of his wife——

The Court: Of the Vancouver corporation?

Mr. Boldt: Of the Vancouver corporation; yes, sir.

Mr. Snow: No objection, your Honor.

The Court: It will be admitted.

The Clerk: Defendant's Exhibit A-6 marked for identification and received.

(Document referred to marked Defendant's Exhibit Number A-6 for identification; and received in evidence.)

Mr. Boldt: Also, I have here the original minute book of the Washington corporation and I will be glad to put in the whole book, or any part of it, that anybody deems appropriate. My view of it is that, at the present time at least, the only portion that is appropriate are the original minutes of the International Electric Fence Company meeting following the organization of the company. These minutes are signed by Mr. Turk, R. H. Turk, as president and attested to by Mr. Hughes as secretary. Is this your signature, [58] Mr. Turk?

Mr. Turk: Yes.

Mr. Boldt: Do you want the whole book? All I think is pertinent at this time——

Mr. Snow: I think we ought to have the whole book if it purports to be the minutes of the corporation, your Honor.

Mr. Boldt: The reason I want to hold out the whole book is to eventually make photostat copies

of some of the portions of this particular copy. There is no use in tying up the rest of the book.

Mr. Snow: I will stipulate that copies of any original exhibits introduced here by the Defendant may be—copies may be substituted therefore at any time, but as to the authenticity of the original, I should like, first, before I approve them or don't approve them, for an opportunity of checking them over, and I think——

Mr. Boldt: With that in mind, I am going to make this statement if your Honor please. The original book will be here and kept in court and will be available for counsel or court or anybody. I am not going to offer the whole book but now in the presence of the court and counsel, withdraw the two sheets purporting to be the minutes of the first annual meeting of the directors of the International Electric Fence Company, Inc., the defendant corporation, [59] reciting that the meeting was held on November 4, 1941, this original being that which Mr. Turk just stated bears his signature and that of Mr. Hughes.

Mr. Snow: I will object to piece-meal introduction on the ground it is a loose leaf book and I seriously question that there might be some objection to it. This is the first time it was brought up and before I agree to it I would like to see what the matter purports to be.

The Court: I won't require you to stipulate, but it can be submitted as an exhibit.

Mr. Boldt: But you do verify the fact that Mr.

Turk has acknowledged his signature on this exhibit?

The Clerk: Defendant's Exhibit A-7 marked for identification.

(Document referred to marked Defendant's Exhibit Number A-7 for identification.)

Mr. Snow: I will admit that that is the signature on page two of that exhibit, which is not a bound paper. It is two loose pages that have been stapled together by the Clerk of the Court, and that is Mr. Turk's signature on——

Mr. Boldt: Yes. Now, if you want to examine it further, you can do so later.

Now, there are one or two other things. Your Honor will recall that on July 1, 1944, Mr. Hughes bought all [60] of the balance of the stock in the Washington corporation from Mr. Turk. Now, following that date for a short time, up until October of 1944, Mr. Turk manufactured a few units of these fencers which were furnished to the Washington corporation. Is that correct?

Mr. Turk: That is right.

Mr. Boldt: And further, in October, 1944, by letter, in writing, which was admitted in evidence in the Clark County case, Mr. Turk refused to sell any further fencers to Mr. Hughes on the price basis. There was a difference between them about the price. Is that correct?

Mr. Snow: I think, Mr. Boldt, that as long as you are going through those exhibits, why don't you put them in evidence.

Mr. Boldt: All I want to do is have the time of them.

The Court: Why can't you stipulate to the bare facts.

Mr. Snow: If there is a letter involved——

The Court: No; that Mr. Turk declined to sell any more of the products that he had theretofore been selling.

Mr. Snow: Well, your Honor, a bare fact like that could be elaborated upon. As long as they mention a particular type of letter, I think it ought to be introduced. [61] I have them here and would like to introduce them in evidence either as plaintiff's or defendant's exhibits.

The Court: Can't you stipulate that, as evidenced by a letter, he no longer sold——

Mr. Boldt: Let me ask Mr. Turk. From October, 1944, on, about three or four months following the time Mr. Hughes bought your stock, you did not furnish Mr. Hughes any further fencers?

Mr. Turk: That is correct.

Mr. Boldt: And the reason you did not furnish them to him is because of the dispute as to the appropriate charges for them?

Mr. Turk: That is part of it.

Mr. Boldt: One of the elements?

Mr. Snow: I will agree to that, your Honor. Those facts——

Mr. Boldt: Then further, your Honor, from and after October, 1944, the defendant procured their fencer requirements from Mr. Soper's concern in Minneapolis.

Mr. Turk: As far as I know.

Mr. Boldt: As far as you know. Now, further, the next date would be February 14, 1946, which was the date that Mr. Turk verified the original complaint in the Clark County case. You will find that to be a fact. And that the amended complaint in the Clark County case was verified [62] May 7, 1947.

Mr. Snow: Have you, first, February 14, 1946, and, second, May 7, 1947?

Mr. Boldt: That is right. Plaintiff's Exhibit 4 is dated May 26, 1947.

The Court: 1947?

Mr. Boldt: 1947, yes, your Honor. Now, the date of the registration that we are concerned with is October 8, 1946. The registration is dated October 8, 1946.

Mr. Snow: The date the certificate was granted by the patent office is October 8, 1946, but the application itself for this registration was filed in the United States Patent Office August 20, 1945.

The Court: Well, you can stipulate as to those dates.

Mr. Boldt: Oh, yes; that is right.

The Court: But the point you are making now, do you stipulate to that? That is, that the notice by registered mail from the plaintiff to the defendant was in 1947?

Mr. Boldt: That is right. May.

The Court: Subsequent to the issuance of the——

Mr. Boldt: May 27, 1947.

The Court: —of the letter or whatever document— [63]

Mr. Boldt: Yes, and that the registration was issued October 8, 1946, six or seven months prior to this notice, but I was particularly interested in your Honor's keeping in mind the dates as to the Clark County case.

Mr. Snow: Mr. Boldt, will you stipulate that the Defendant has sold electric fencers and electric fencer equipment and electric controllers through the various states of the United States bearing the trade mark "International" which appears on Plaintiff's Exhibit—

The Court: Here.

Mr. Snow: They seem to have been in this envelope but are not there now. Bearing labels similar to those appearing on Plaintiff's Exhibit 5, which were attached to the Soper deposition, in interstate commerce?

Mr. Boldt: Why don't you have this marked here now so that we won't get mixed up with the exhibits.

The Court: He wants to know if you will so stipulate.

Mr. Boldt: Yes; I am going to so stipulate.

Mr. Lyons: Is that four or five?

The Clerk: Five.

Mr. Lyon: What is four?

The Court: I am assuming the Clerk is using his own numbers and not the deposition numbers.

Mr. Boldt: I think, Counsel, if you would not

refer [64] to the deposition numbers it would save confusion.

The Court: If there are any other exhibits that you can stipulate on——

Mr. Lyon: Do you have a Plaintiff's Exhibit 4?

The Court: What are your exhibits for the Plaintiff? What is Exhibit 1?

The Clerk: You have Number 1, your Honor.

Mr. Snow: The partnership agreement.

Mr. Boldt: No.

Mr. Snow: The original registration—you have right there.

The Clerk: That is Number 2.

Mr. Snow: That is where the confusion comes in.

The Court: Exhibit 1 is the partnership agreement.

Mr. Snow: All right.

The Court: There should be an A-1, a transcript of the pleadings in the State Court case. Let's check through all the exhibits now.

The Clerk: Plaintiff's Exhibit 1.

The Court: Now what is 2?

The Clerk: Registration of the word "International."

The Court: Very well.

The Clerk: And then we have Plaintiff's Exhibit 3, is [65] the assignment, Richard H. Turk. 4, letters, International Electric, May 26, 1945.

The Court: And Plaintiff's Exhibit 5?

The Clerk: The two stock certificates.

The Court: Oh.

Mr. Snow: No.

Mr. Boldt: No.

Mr. Snow: Plaintiff's Exhibit 5 is the one I just handed you.

The Clerk: Correct.

Mr. Snow: It is defendant's labels that have been used on defendant's products.

The Court: Does that straighten you out now, Mr. Lyon?

Mr. Lyon: Yes.

The Court: Now, is there any confusion on the other group of exhibits, the Defendant's exhibits?

Mr. Lyon: No, sir.

The Clerk: This is admitted, your Honor?

The Court: It is admitted.

The Clerk: Plaintiff's Exhibit 5 is admitted. And the others?

The Court: Yes; they will all be admitted, if they have not already been.

(Documents heretofore referred [66] to marked Plaintiff's Exhibits Numbers 2, 3, 4 and 5 and received in evidence; and documents heretofore marked Defendant's Exhibits Numbers A-1, A-2, A-5, and A-7 received in evidence.)

PLAINTIFF'S EXHIBIT No. 1

Partnership Agreement

This partnership agreement made this First day of June, A.D. 1943, between Vernard Soper of

Minneapolis, Minnesota, and Richard H. Turk of Chicago, Illinois, at Chicago, Illinois.

Witnesseth that the parties hereto make this partnership agreement on the following terms and conditions:

1. The partnership shall be for the purpose of carrying on the business of manufacturing and selling electric fences for farm use.

2. The partnership shall begin on the First day of June, A.D. 1943 and shall continue until terminated by the consent of the parties.

3. Said partnership shall be conducted and carried on under the partnership name of International Electric Fence Company.

4. The place of business shall be at 910 W. Van Buren Street, Chicago, Illinois, or at such other place or places as the partners shall thereafter determine.

5. Richard H. Turk shall have charge of the sales of the products of the partnership and shall be known as Sales Manager, with headquarters in Chicago, Illinois; Vernard Soper shall have charge of production and shall be known as Production Manager, with headquarters in Minneapolis, Minnesota.

6. (a) Richard H. Turk, now the owner of Two Hundred (200) shares of stock of International Electric Fence, Inc., a corporation, of Vancouver, Washington, with offices located at 2215 Main Street, hereby agrees to immediately turn over and surrender to Vernard Soper, One Hundred (100) shares of stock in said corporation, and cause the

said One Hundred (100) shares of stock to be issued in the name of the said Vernard Soper. The said corporation is organized to distribute and sell electric fences to farms in the states of Washington and Oregon.

(b) Richard H. Turk further agrees to surrender to the partnership his exclusive rights to sell electric fences in the western states of the United States.

(c) Vernard Soper agrees to turn over and surrender to the partnership all goods, chattels, inventory, bank accounts, credits and accounts now standing in his name or in the name of the International Electric Fence Company, at Chicago, Illinois.

7. A bank account shall be maintained in the Mid-City National Bank in Chicago under the firm name, or in any other bank selected by the partners.

8. Each of the parties hereto shall diligently employ himself in the business of the said partnership, and be faithful to the other in all transactions relating to the firm, and give, whenever required, a true account of all business transactions arising out of, or connected with, the conducting of the partnership, and neither shall, without the written consent of the other, employ either the capital or the credit of the partnership in any other than the partnership business.

9. Books of account shall be kept by said partners, and entries made therein of all moneys, goods, effects, debts, sales, purchases, receipts, payments, and all other transactions of the said partnership.

Said books of account, together with all bonds, notes, bills, letters and other rights belonging to the partnership shall be kept where the business of the partnership shall be carried on, and shall be at all times open to the examination of both partners.

10. Neither of the partners, during the continuance of this partnership, shall assume any liability for another or others, by means of indorsement or of becoming guarantor or surety, without first obtaining the consent of the other thereto in writing.

11. In case of the determination of this partnership, from whatever cause, the parties hereto agree that they will make a true, just, and final account of all things relating to said business, and in all things duly adjust the same. And after all the affairs of the partnership are adjusted, and its debts paid off and discharged, then all the stocks, as well as the gains and increase thereof, which shall appear to be remaining, either in moneys, goods, fixtures, debts, or otherwise, shall be divided equally between the parties hereto.

12. Each of the partners shall be permitted to draw from the funds of said firm a weekly sum to be agreed upon from time to time for his living expenses. Such sums so drawn shall be charged to the respective partner, and at the annual accounting shall be charged against his share of the profits. If the share of the profits shall not be equal to the sum so drawn, he shall pay the deficiency into the firm at the end of the year.

13. Either of the partners may retire from the

partnership at the expiration of any fiscal year upon giving his partner three (3) months' notice of his intention so to do.

14. That in case of the death of either of the partners before the expiration of the term of partnership, the surviving partner will settle and adjust all accounts, matters, and things relating to the partnership and the executors or administrators of such deceased partner; but the surviving partner shall have the option of taking the whole of the partnership property at a valuation, the amount of which shall be determined by the surviving partner and the heirs or administrator, or by the award of two arbitrators, or their umpire, in the usual manner.

In Witness Whereof, we have hereunto set our hands and seals, the day and year above written.

.....(Seal)

.....(Seal)

Admitted Jan. 13, 1949.

PLAINTIFF'S EXHIBIT No. 2

Registered Oct. 8, 1946

Trade-Mark 424,467

Plaintiff's Exhibit "I"

United States Patent Office

Richard H. Turk, doing business as International
Electric Fence Co., Chicago, Ill.

Act of February 20, 1905

Application August 20, 1945, Serial No. 487,342

International

Statement

To the Commissioner of Patents:

Be it known that Richard H. Turk, a citizen of the United States, whose post office address is 910 West Van Buren Street, Chicago, Illinois, doing business as International Electric Fence Co., of Chicago, Illinois, having its principal place of business at 910 West Van Buren Street, Chicago, Illinois, has adopted and used the trade-mark shown in the accompanying drawing, for Electric Fences, in Class 21, Electrical apparatus, machines, and supplies, and presents herewith five specimens (or facsimiles) showing the trade-mark actually used by applicant upon the goods, and requests that the same be registered in the United States Patent Office in accordance with the act of February 20, 1905, as amended.

The trade-mark has been continuously used and applied to said goods in applicant's business and in the business of his predecessors since January 1, 1938.

The trade-mark is applied or affixed to the goods, or to the packages containing the same, by means of a label bearing the mark or by printing or impressing the mark on the goods in divers other ways.

The undersigned hereby appoints Albert J. Fihe, 6733 South Chicago Avenue, Chicago, Illinois, registered attorney No. 11,633, its attorney, with full power of substitution and revocation, to prosecute this application, to make alterations and amendments therein, to receive the certificate, and to transact all business in the Patent Office connected therewith.

RICHARD H. TURK.

Admitted Jan. 13, 1949.

PLAINTIFF'S EXHIBIT No. 3

Plaintiff's Exhibit "II"

Assignment

In consideration of One Dollar and other valuable consideration by me received, I, Richard H. Turk, doing business as International Electric Fence Co., having my principal place of business in Chicago, County of Cook and State of Illinois, hereby sell and assign to the International Electric Co., a corporation of the State of Illinois, having its principal place of business in the City of Chicago, County of Cook and State of Illinois, all of my right, title and interest in and to "International" as a trade name for electric fences; and of such goodwill to myself and right of manufacture as relates to the

use of said trade mark; and I hereby sell and assign to said International Electric Co., my entire right, title and interest in and to the Certificate of Registration of the aforesaid mark, No. 424,467, registered in the United States Patent Office on October 8, 1946; all rights to said trade mark to be held and enjoyed by said International Electric Co., its successors or assigns to the same extent as which would have been held by me, except for this assignment.

RICHARD H. TURK (Copy)

Doing business as

INTERNATIONAL ELECTRIC
FENCE CO.

State of Illinois,
County of Cook—ss.

Richard H. Turk, personally known to me, appeared before me in person and acknowledged that he signed, sealed and delivered the above instrument as his free act and deed this 10th day of June, 1947.

JULIAN S. MATUSZEWSKI,
(Copy)

Notary Public.

My commission expires August 4, 1948.

Mailed to P. O. on June 11, 1947

Rec'd from P. O. on July 2, 1947

Recorded June 13, 1947

Liber A-212 Page 299

Assignment mailed on July 3, 1947

International Electric Co.

Admitted Jan. 13, 1949.

PLAINTIFF'S EXHIBIT No. 4

Plaintiff's Exhibit "III"

May

Twenty-sixth

1947

International Electric Fence Co.

17th and Main Streets

Vancouver, Washington

Attention: Mr. George N. Hughes

Gentlemen:

Our client, International Electric Co., of this city, has informed us that you are using the trade mark "International" on Electric Fences.

Our client is the owner of United States Certificate of Registration No. 424,467, registered in the United States Patent Office on October 8, 1946, which registration covers the word "International" as applied to Electric Fences.

Your use of the word "International", therefore, infringes upon our client's trade mark rights, and unless you immediately cease and desist from using this word as a trade mark on your goods, our client will be forced to file suit for trade mark infringement, against you. We, therefore, demand that you immediately cease use of this mark and inform us that you will comply with this demand at once. Otherwise, we will advise our client that it should immediately file suit for trade mark infringement against you.

Unless we hear from you by June 4, we will

assume that you have taken the position that you will not respect our client's trade mark rights, and, in that event, we will advise our client to start suit, not only to enjoin your use of this word, but also to recover profits and damages for the injuries our client has suffered, because of your infringement of its rights.

Yours very truly,

RUMMLER, RUMMLER
& SNOW

By

WAS:MR

Admitted Jan. 13, 1949.

Mr. Snow: Defendant also agrees to stipulate as to three labels used by the Plaintiff corporation and if the Clerk will please identify them as 6——

The Clerk: All as one exhibit?

Mr. Snow: No. 6, 7 and 8, since they have separate tags on them I think it will prevent confusion.

The Court: They will be marked for identification and admitted.

(Items referred to marked Plaintiff's Exhibits 6, 7 and 8 for identification and received in evidence.)

Mr. Snow: The Defendant has agreed, your Honor. There is no objection to it.

Mr. Boldt: That is right.

Mr. Snow: Your Honor——

The Court: I think you have pretty well covered what would ordinarily be covered in a pre-trial conference.

Mr. Boldt: Yes.

The Court: And if there is something further, why, when we reconvene, if either of you think of something further you can make it known to the Court. What I am seeking [67] to do is limit the testimony on matters that are not stipulated or agreed upon. Perhaps we would all be better off if the reporter could transcribe this stipulation, but I doubt whether he can do that between now and two o'clock.

Mr. Boldt: I don't think it is as difficult as it might seem.

The Court: It all depends on our own memories and thoughts as to what we have stipulated.

Mr. Boldt: I don't think it will be difficult because you will notice we are trying to cooperate.

I might say, with respect to the last thing you asked me about, will it be stipulated that we have sold throughout the United States.

Mr. Snow: I didn't say that.

Mr. Boldt: We would stipulate that the Defendants have sold in several Western States. It sounded as if we were doing business all over the United States.

Mr. Snow: I just asked you if you would stipulate that you used this in interstate commerce.

Mr. Boldt: Oh, yes.

Mr. Snow: Was it your Honor's intention that we should adjourn now?

The Court: Yes.

Mr. Snow: Thank you; because I can look these things over in the noon hour. [68]

The Court: We will reconvene this case at two o'clock. Court will be at recess until one-thirty.

(Whereupon, at 12:00 o'clock, noon, January 13, 1949, a recess in this cause was had until 2:00 o'clock, p.m., January 13, 1949.)

(Counsel heretofore noted being present, the following proceedings were had.)

The Court: Now is there anything further, gentlemen, by way of stipulations before we enter upon the taking of testimony?

Mr. Snow: Yes, there is, your Honor. Counsel for Defendant has agreed to stipulate that these three devices, which are the subject matter and the devices in suit, containing the trade mark, bears his label and I would like to introduce them in evidence as Plaintiff's, I think it is, 7, 8 and 9.

The Clerk: 9, 10 and 11.

Mr. Snow: 9, 10 and 11?

The Clerk: Yes.

Mr. Boldt: We have no objection. However, I have suggested that the point might well be covered by a stipulation to preclude the record being burdened by objects of this kind. However, that is a matter of convenience to all concerned. We have no objection.

The Court: I think the exhibits, since they are being offered, might be admitted. You have no objection on [69] the grounds of relevancy?

Mr. Boldt: No; that is right.

(Items referred to marked Plaintiff's Exhibits Numbers 9, 10 and 11 for identification, and received in evidence.)

Mr. Snow: Your Honor, I believe if we do this now we can save time later. If you will allow us to stipulate that these heavier exhibits may be retained by counsel for Plaintiff at the conclusion of the trial, subject to the order of the Court, of course, at all times so as not to burden the Clerk's office with these exhibits?

The Court: Yes.

Mr. Snow: And subject always, of course, to inspection by counsel for the Defendant.

The Court: The exhibits will be admitted in evidence under the designations given to them.

Now then, you may proceed.

Mr. Snow: Your Honor, in talking with counsel for Defendant here, he said—I made the statement that—well, there is nothing we can shorten up on—but, we can shorten this up considerably now if we can decide whether or not your client is the proper owner of this trade mark and if he is, then whether or not the Defendant has a right to use it, before we go into the unfair competition. I am saying this without speaking for counsel for I don't know if [70] your Honor wants to try the case piecemeal like that or not, because the trade mark is in evidence and the certificate of registration. It has been stipulated that they do use the trade mark "International" on these products, the same goods cited

in the trade mark certificate, and that the goods are shipped in interstate commerce, and the title is in the Plaintiff's name and that, in my opinion, your Honor, is a prima facie case of trade mark infringement up to that point.

The Court: I don't think it is stipulated that the title——

Mr. Snow: The title certificate, your Honor.

The Court: Oh, yes.

Mr. Snow: If I made a broad statement, it wasn't intended as such.

The Court: I think we should try at this stage—it might become decisive on the issue of unfair competition—who is entitled to it.

Mr. Boldt: Exactly the point I had in mind, your Honor, because if that were found in our favor, I think that would be the end of the case. I think you will agree, Mr. Snow.

The Court: And that would be the end of the case, if found for the Plaintiff, too.

Mr. Boldt: That would be the end either way.

Mr. Snow: Would that preclude a ruling on the part of the Plaintiffs in unfair business practices? That is what we are concerned with.

The Court: If the Plaintiff isn't entitled to the use of the trade name, it would raise the other issue, that is right, as to whether the injunctive issue would follow. As to whether there was unfair competition and whether damages should be allowed for what has been done, that would be another issue.

Mr. Snow: That is right, your Honor.

The Court: And I asked counsel this morning whether you were proceeding under the old or new law. The old law gives the Court leeway in assessing damages and the new law has eliminated any damages in excess of actual damages.

Mr. Snow: I have pleaded, in the original and amended Complaint, that in the event damages are assessed, I asked that the Court consider the assessing of treble damages.

The Court: I would rather try out the issue as first mentioned as to who is entitled to this trade name, if either of these parties are.

Mr. Snow: In connection with the exhibits, we have just one more, your Honor, that counsel for Defendant has agreed to its admissibility as showing other labels of [72] of the Defendant using the name "International" and I would like to introduce that in evidence.

The Court: It may be marked and admitted.

The Clerk: Plaintiff's Exhibit 12 marked for identification and admitted.

(Item referred to marked Plaintiff's Exhibit Number 12 for identification, and received in evidence.)

Mr. Snow: Is it your Honor's wish—maybe I am confused—that we will try the trade mark case exclusively and then depending upon your ruling, go into the other?

The Court: That is right.

Mr. Snow: Will your Honor want me to present

a short argument on the law after all the evidence is in on the trade mark, or what do you desire in that regard

The Court: Well, I will leave that matter open and see what progress we made through the evidence.

Mr. Snow: As I explained to your Honor, as far as I am concerned, by law, I believe, I have established by stipulation and the exhibits a prima facie case on behalf of the Plaintiff on trade mark infringement and I might have some rebuttal testimony after the Defense puts his defense in. But, as far as the law is concerned, I believe I have established that by entering into the stipulations and the [73] accepting of the exhibits.

The Court: I am rather inclined to agree with you on that, and we can proceed now on the second affirmative defense of the Defendant in which he alleges he is the owner of these.

Mr. Snow: Thank you.

Mr. Boldt: The Plaintiff rests insofar as the issue of trade mark is concerned?

Mr. Snow: That is right. That is right.

Mr. Boldt: Yes. Now then, in order to get the record in appropriate condition, I want to challenge the sufficiency of the evidence here and move the Court for a judgment and decree in favor of the Defendant on the record as it now appears.

The Court: I don't think you need to argue the matter. I shall deny your motion.

Mr. Boldt: None of the facts, I would like to point out to you,—

The Court: If it is necessary, you will have an opportunity to do that later, Mr. Boldt. I certainly am not going to ask for a semi pre-trial order and then decide upon the basis of the stipulated facts that I should dismiss the case. I am willing that you can take the record in that manner. There is evidence that the Plaintiff is the holder of this trade mark, registered—— [74]

Mr. Boldt: That is right.

The Court: And that does make a *prima facie* case.

Mr. Boldt: It would if there weren't anything else in the record, but the record now shows that this same Plaintiff——

The Court: I am going to allow you an exception and overrule your motion.

Mr. Boldt: I am a little bit at a loss to know how to proceed, because now the greater part of the evidence in the case is presented here by stipulation and by the exhibits.

The Court: Oh, ultimately this matter of the use of this trade name is going to be a factor in determining the issue and the Defendant alleges affirmatively that the trade name was used in this corporation when he was associated with the Plaintiff, and that when he bought out the corporation—he doesn't allege in so many words, but that—he acquired the property rights in the trade name.

Mr. Boldt: That is right. And I have authority, I think, that would satisfy your Honor that that is the case.

The Court: But I would like some evidence on that.

Mr. Boldt: Very well, your Honor. Mr. Hughes, please. [75]

GEORGE N. HUGHES,

the Defendant, called as a witness for and on behalf of the Defendant, upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Boldt:

Q. Will you state your name in full to the Court, please? A. George N. Hughes.

Q. Where do you live?

A. Vancouver, Washington.

Q. How long have you lived in Vancouver, Washington? A. About twenty years.

Q. And you and your family have resided there that length of time? A. Yes.

Q. What is your occupation at this time?

A. Merchant.

Q. And you are the George N. Hughes mentioned in the Complaint?

A. Yes; that is right.

Q. Now, Mr. Hughes, I am going to try and eliminate going into the matters covered by the stipulation this morning. A. Yes. [76]

Q. So that I won't cover the same ground, perhaps for that purpose, I could be a little bit leading. As I understand it, you first met Mr. Turk in 1938?

A. No, 1940.

(Testimony of George N. Hughes.)

Q. Mr. Turk? A. Yes.

Q. Oh, I see. And where did you meet him then? A. At his office.

Q. In Vancouver?

A. Just out of Vancouver—north.

Q. Now, for a period of time you were employed by Mr. Turk? A. That is right.

Q. What was the name of the concern that you were then employed by?

A. International Electric Fence Company.

Q. And that was an individual. Mr. Turk was conducting it by that name?

A. That is right.

Q. What were the products being handled by that company?

A. Principally electric fence controllers and accessories that go with it.

Q. And what trade name was applied to those products?

A. The trade name "International." [77]

Q. Now, is that the same trade name shown on these various exhibits, labels of one kind or another, here? Exhibit 12 is one, and 7 is another, and 6 and 5? A. Yes. That is right, sir.

Q. I notice, Mr. Hughes, that on these various labels the name "International" is carried in a script form.

A. We have always carried it that way.

Q. The name has always been used, on any tags where the name was carried, in script form?

(Testimony of George N. Hughes.)

A. That is right.

Q. Now, when you say always has, you mean from 1940 on?

A. Ever since I have known the business and on.

Q. Had that tag with it?

A. That is right.

Q. Now, those tags were affixed to what objects?

A. Electric fence controllers.

Q. Of the type shown in Exhibits 11, 9 and 10?

A. That is right.

Q. What were the products that were being handled by Mr. Turk's Company in 1940 when you first became connected with it?

A. Electric fence controllers mostly and a few other things that went with it.

Q. The same products that have been carried right on [78] down to the present time?

A. That is right. Just the same.

Q. Now, I believe in October, on October 9, 1941, Mr. Turk and his wife, and you and your wife, as incorporators organized a corporation under the laws of the State of Washington, did you?

A. That is right.

Q. And that corporation is the Defendant corporation in this action, namely the International Electric Fence Company, Inc., a Washington corporation?

A. That is right.

Q. Calling your attention to Exhibit A-6, which is the articles of incorporation, the signatures on that document are the original signatures of your-

(Testimony of George N. Hughes.)

self and wife and Mr. Turk and his wife; is that correct? A. That is correct.

Q. Now, Mr. Hughes, at the time that you organized this corporation, what part of the ownership of the corporation was acquired by you and Mrs. Hughes and what part was retained by Mr. and Mrs. Turk? A. One-half each.

Q. The total authorized capital stock was four hundred shares, I believe? A. That is right.

Q. And you and Mrs. Hughes took two hundred shares by [79] the stock subscription shown in the minute book, which counsel has, apparently, been examining? A. That is right.

Q. And Mr. and Mrs. Turk subscribed for the other two hundred shares; is that correct?

A. Yes.

Mr. Snow: I believe we have admitted all this, your Honor.

The Court: Yes.

Mr. Boldt: Well, it is a little hard to complete it.

Q. (By Mr. Boldt): Now, at the time that the corporation was organized, what was it? What was the purpose of the organization? The corporation, what was this company going to do?

A. Sell electric fence controllers and related products all over the Western States.

Q. Was it going to carry on any existing business that had been going on before that?

A. Yes. The business formerly owned by Mr. Turk himself as an individual.

(Testimony of George N. Hughes.)

Q. I see. And that was to be carried on as a going concern; is that right?

A. That is right. He just continued the same business. [80]

Q. Now, referring your attention here, Mr. Hughes, if I may, to the Exhibit A-7—

Mr. Snow: Your Honor, if we may interject an objection here to this line of questioning. The articles of incorporation speak for themselves and I can't see why they can be changed by any testimony.

Mr. Boldt: That is right, the written documents can not be, but I can not do it all at one time.

The Court: Proceed.

Q. (By Mr. Boldt): Referring your attention now, Mr. Hughes, to Exhibit A-7, which are the minutes of the meeting of November 4, 1941, which this morning I took out of the minute book in the presence of Mr. Snow and the Court, and we had them marked; do you recognize that?

A. Yes.

Q. Now, these minutes bear the signature of R. H. Turk as president and G. N. Hughes as secretary. Are those signatures respectively those of Mr. Turk and yourself, Mr. Hughes?

The Court: I think that was admitted, wasn't it?

A. They are.

The Court: I thought counsel admitted that.

Mr. Boldt: Yes. [81]

(Testimony of George N. Hughes.)

Q. (By Mr. Boldt): Now, Mr. Hughes, in document A-7 the following appears: "R. H. Turk and G. N. Hughes had heretofore owned certain assets as co-partners, and were doing business in Vancouver as an electric fence company, and had built up a business and created good will. The said assets consisted of machinery, equipment, good will, accounts receivable, etc. Said G. N. Hughes and wife and R. H. Turk and wife then offered to convey to the corporation all of the assets of said co-partnership in full payment of the capital stock subscribed by R. H. Turk and wife and G. N. Hughes and wife. It was thereupon duly moved, seconded and carried that the best interests of the company would be furthered by accepting the offer; that the reasonable value of the said assets was \$1,000.00, and the officers of the corporation were thereupon instructed and authorized to issue to the stockholders common stock in payment of said assets, and that their stock subscriptions were considered paid in full."

Do you recall that entry? A. Yes.

Q. And that, of course, that entry was made and signed and subscribed to by Mr. Turk and yourself on the date it bears; is that correct?

A. That is right. [82]

Q. Now, Mr. Hughes, in addition to the advances made, what assets of the preceding business—strike that. Let me ask you, did Mr. Turk, was Mr. Turk, at that time, conducting any other

(Testimony of George N. Hughes.)

business in Vancouver, or anywhere else, in the electric fence business, excepting the business taken over by the corporation?

A. No; no other business.

The Court: Were you?

The Witness: No.

Q. (By Mr. Boldt): There was no other electric fence business being conducted by either yourself or Mr. Turk at that time; is that right?

A. No. That is right.

Q. Now, an integral part of the business taken over by this business at that time was the sale of products having labels similar to the labels I called your attention to a moment ago?

A. That is right.

Q. There was no change in the name "International" carried in script on the product?

A. None whatever.

Q. And it has been carried down to the present time? A. That is right.

Q. Now, Mr. Hughes, at the time of the organization of [83] the corporation, did you pay some money to Mr. Hughes or into the company or in some manner convey consideration to him?

A. To Mr. Turk, you mean?

Q. To Mr. Turk; yes, excuse me.

A. Yes; I did.

Q. You paid him some money on the purchase to equalize the purchase of your half of the business? A. I did.

(Testimony of George N. Hughes.)

Q. And all of the assets, as recited in the minutes, of the preceding business were conveyed to the corporation? A. That is right.

Q. Now, after organization of the corporation, in October 9, 1941, until July 1, 1944, did Mr. Turk conduct any business, electric fence business, or any other business, using the same name or any other similar to that excepting in connection with the Washington corporation? Insofar as any activities outside of the Vancouver office were concerned?

A. No; except what he did in Chicago when he went back there.

Q. When he went back to Chicago?

A. Yes.

Q. Now, were you in any manner—did you in any manner participate in any of the decisions on matters that [84] Mr. Turk and Mr. Soper reached in their business transactions?

A. No. I had nothing to do with that at all. I didn't know anything about it until it was over. Any of those transactions were their own affairs.

Q. You were not consulted? A. No.

Q. Or your approval sought?

A. No; not at all.

The Court: In 1941 you organized the corporation and you both devoted your time and energies and efforts towards selling the products?

The Witness: That is right; your Honor.

The Court: And how long did that situation

(Testimony of George N. Hughes.)

continue where you both worked out of Vancouver and stayed in Vancouver?

The Witness: Until I bought him out, July 1, 1944.

The Court: For a period of about three years?

The Witness: Approximately; yes.

Q. (By Mr. Boldt): During which time both—that was the thing I was coming to—both you and Mr. Turk were active in the affairs of the Washington corporation during that three year period; is that right? [85]

A. That is right.

Q. What office was held by Mr. Turk?

A. Mr. Turk at all times up to that time was president of the corporation and I was secretary.

Q. Mr. Turk was president and you were secretary of the corporation from the time of its incorporation until the time you bought him out in July 1, 1944?

A. That is correct.

Q. Now, during all of that time then, he was—was he also on the pay roll of the corporation?

A. Yes; he was.

Q. He was? A. That is right.

Q. And how was his compensation, as compared to your compensation, in the form of salary or otherwise, in the affairs of the Washington corporations?

A. It was approximately the same with the exception that early when he was travelling on the

(Testimony of George N. Hughes.)

road a great deal of the time he was paid a commission on a portion of it.

Q. But the salary drawn as shown by the minutes were the same for him as for you?

A. That is correct.

Q. And that continued down through the whole time of his connection with the Washington corporation; is that right? [86]

A. That is right.

Q. And in the adjustment made of your affairs when you bought him out, he received full credit for that salary, did he not? A. That is right.

Q. So that in effect, when he received all of the money that he is to receive for the sale on July 1, 1944, he would have received his full and complete and unreduced salary throughout his whole period with the corporation?

A. That is right.

Q. Now, during this period of those three years, were you still handling the same products?

A. We were.

Q. The same labels? A. We were.

Q. Now, after Mr. Turk went to Chicago and began his operations with Mr. Soper, labels were used, were they not, by him in which he continued to carry the name Vancouver, Washington, on those labels? A. That is correct.

Q. In fact, at all times down to the present time, Mr. Turk has continued to carry Vancouver, Washington, on the labels?

(Testimony of George N. Hughes.)

A. Not until the present time but for several months [87] after I bought him out.

Q. And down the entire period of time that this type of label was used, up until you deleted some portions of it, when you took over after buying Mr. Turk out, the label carried on the face of it Vancouver, Washington, did it not?

A. That is right.

Q. As well as Chicago, New York, in some instances? A. That is right.

Q. And with that exception, through the entire period of the use of the label, it did include the words Vancouver, Washington; is that correct?

A. That is correct.

Q. Now, is there any other International Electric Fence Company, Inc., Vancouver, Washington, except the Defendant here?

A. None at all. Nor is there any other in the State of Washington.

Q. Nor is there any in the State of Washington?

A. No.

Mr. Snow: You better give some dates here.

Q. (By Mr. Boldt): During the period since the Washington corporation has been organized, are you aware of any other International Electric Fence Company at Vancouver, Washington, other than [88] the Defendant? A. None at all.

Q. Now, Mr. Hughes,—

Mr. Boldt: The reason that I am hesitating, your Honor, I am frank to say, is that under the authorities, it is not admissible to alter the terms

(Testimony of George N. Hughes.)

of a written instrument subscribed to by both of the parties as was the minutes in this instance parole, and I do not propose to do that——

The Court: I am going to allow you substantial latitude in that regard. That rule was made, of course, as the outgrowth of years of experience, but it is a flexible rule and particularly so in an equity case, so——

Mr. Boldt: The authorities are pretty uniform on that.

The Court: I know there are many of them, but in this case there is allegations of fraud and there is no reason why you shouldn't go in and get the picture and put our cards on the table.

Mr. Boldt: That is right.

The Court: Something arose between these two men six or eight years ago that wasn't reduced to writing and I am anxious to know if the relationship was a profitable one.

Mr. Boldt: If your Honor wants to go into that you [89] will go into a long story.

The Court: I don't want to go into a long story but I want to know what brought this about in 1941; whether this sale of the corporate stock was made prior to Mr. Turk's going East.

Mr. Boldt: Oh, yes, it was. The Washington corporation was organized considerably prior.

The Court: It was organized some three or four years before, but before he started on the Eastern trip did they attempt to settle their ownership of the corporate stock.

(Testimony of George N. Hughes.)

Mr. Boldt: All right. Let's get at it this way then.

Q. (By Mr. Boldt): Mr. Hughes, what led up to—you see what his Honor has in mind—what led up to the matter of your buying out the balance of the stock in the Washington corporation? Just tell his Honor as briefly as you can what led up to it and the circumstances of your taking over the balance of the stock.

A. There were two main reasons. One was the fact that Mr. Turk continued to raise prices on me until I had to pay $33\frac{1}{3}$ per cent more.

The Court: You were working together at Vancouver at that time? [90]

The Witness: No; he was in Chicago.

The Court: Before he went to Chicago. I thought he didn't go to Chicago until 1944.

The Witness: 1943.

Mr. Boldt: Considerably before 1944.

The Witness: More than a year or so.

The Court: What was the understanding that caused him to go to Chicago and you stay here?

The Witness: That was brought out earlier this morning due to the fact that steel and other products were so hard to obtain.

The Court: It was a pleasant transaction?

The Witness: Yes.

Q. (By Mr. Boldt): Did you know when Mr. Turk went back to Chicago that he proposed to go back there and engage in extensive operations with Soper?

(Testimony of George N. Hughes.)

A. No; I knew nothing about that.

Q. What was your understanding with Mr. Turk as to what he was to do there as far as the Washington corporation affairs were concerned?

A. He was to help Mr. Soper speed up production of the electric fence controllers so as to get them out here to sell. We had many orders and couldn't supply them.

The Court: While I have it in mind—when you went [91] into a corporate existence from a copartnership, as it were, in 1941, you had been transacting a substantial amount of business through the year 1940?

The Witness: Yes.

The Court: And in 1941 you organized the corporation?

The Witness: Yes.

The Court: Did it take over all of the accounts current and all of the liabilities that the copartnership had?

The Witness: Yes.

The Court: And you had orders that you hadn't filled yet at the time you set up the corporate structure?

The Witness: Yes.

The Court: And you had orders that had been filled and not paid for?

The Witness: Yes; accounts receivable shown on the books.

The Court: And all of that went into the corporation?

(Testimony of George N. Hughes.)

The Witness: Yes.

Mr. Boldt: On that, let me bring out a point.

Mr. Snow: Mr. Boldt, please; I would like to correct a misimpression in his Honor's mind. There was no copartnership of any kind between this man, Mr. Hughes, and [92] Mr. Turk, prior to the formation of the corporation; and I am sure your Honor speaks of a copartnership.

Mr. Boldt: The minutes record that there was signed, by both Turk and Mr. Hughes——

The Court: Then he should be interrogated as to whether there was a copartnership.

Mr. Snow: I wanted to be sure, because that was my impression.

Q. (By Mr. Boldt): Now, was there any other part of the business that Mr. Turk was conducting as an individual in Vancouver that was not turned over and assigned to and taken over and serviced and conducted by the new corporation?

A. None at all; no part at all.

Q. Every single phase of the business operation prior to that time was continued by the corporation without a break in continuity; is that correct?

A. That is right.

Q. Now, this matter of whether or not there was or was not a partnership. The minutes signed by both yourself and Mr. Turk recite that R. H. Turk and G. N. Hughes had certain business as copartners and had built up a business, and the said assets consisted of machinery and so on and Hughes and wife and Turk and wife then offered

(Testimony of George N. Hughes.)

to convey to the corporation all of the assets of the copartnership in [93] payment of the stock, and so on—do you recall that? A. Yes, sir.

Q. Those minutes were signed by you and Mr. Turk? A. Yes.

The Court: He testified to that.

Q. (By Mr. Boldt): Who prepared—who wrote them?

A. When we decided to incorporate we went to Mr. Shaffer.

Q. Louis Shaffer? A. Yes.

Q. Now continue.

A. We gave him the circumstances how we were conducting the business, what the property was, and had him draw up the papers as he thought they should be and he prepared these minutes himself. Those are his own stenographer writings, his dictation, and we considered that he was writing the way they should be written and we both signed it.

Q. Now, at the time that you presented the facts and circumstances of the situation to Mr. Shaffer, was Mr. Turk present at that time?

A. Yes; we talked about it.

The Court: When you say “we,” you mean you and Mr. Turk and the attorney? [94]

The Witness: Yes.

The Court: You didn’t have your wives there?

The Witness: No; I don’t think so.

Q. (By Mr. Boldt): In——

The Court: Just a moment now. Let me ask

(Testimony of George N. Hughes.)

another question. Of course, I am assuming there might have been some long discussions between you and Mr. Turk before you decided to employ an attorney and draft articles of incorporation and there might not have been. Do you recall now who suggested that you incorporate?

The Witness: It was my suggestion.

The Court: That is all.

Q. (By Mr. Boldt): Now, at this time——

Mr. Boldt: Your Honor, I don't want to offer any evidence in violation of evidence rules but in view of your Honor's comments, I will ask Mr. Hughes this.

Q. (By Mr. Boldt): Were there, Mr. Hughes, any understandings, agreements, reservations or limitations of any nature between you and Mr. Turk concerning any limitation on the right of the new corporation to use the name "International" on its products and in its business?

Mr. Snow: May I have the question repeated before [95] you answer? A. No.

The Court: He answered "no."

(Whereupon, material appearing in lines 20 through 24, page 95, were read by the reporter.)

Mr. Snow: And what was the answer?

The Witness: None whatever.

Q. (By Mr. Boldt): Was there anything else that this company was doing excepting selling and distributing products under the name "International"?

(Testimony of George N. Hughes.)

A. That is all we were doing; that was our business.

Q. That was the very heart of your business?

A. That is right.

Q. Now, after the corporation was organized and you continued operating until the time you purchased his stock, was there any change in the use of the name "International"?

A. None whatever.

The Court: I think he answered "none whatever."

Q. (By Mr. Boldt): Now, I want you to tell the Court—answer the question I asked some time ago—tell the Court what the circumstances were that led up to your taking over the balance of the stock of the corporation.

A. I practically answered that. The first reason was [96] what he charged me at that time for these electric fence controllers.

Mr. Snow: Your Honor, I am going to have to object unless he specifies dates and times and who was present. I don't like to interject but I think we can save a lot of cross examination.

The Court: There appears to be something left out. After Mr. Turk went back East was there some change that was——

The Witness: Yes.

The Court: Tell us what it was.

The Witness: After Mr. Turk went back there, he became half owner back there and consequently had control of our source of supply, being half

(Testimony of George N. Hughes.)

owner here too. And after he was back there a short while and instead of shipping these controllers and other merchandise to us to distribute to the State representatives for other states, Washington, Oregon, Idaho, California, any place we might get business, he began to ship them direct, thus eliminating the Vancouver corporation from participation in the business of the outside states and that way was limiting us to the two states and depriving us of our share of the business of the other states on the West Coast.

Q. (By Mr. Boldt): Now, let us go into that a little bit more to be [97] sure we have it correct.

The Court: Well, now, when that situation occurred, you had not negotiated for the purchase of the stock?

The Witness: No. That is one of the things that led up to it.

Q. (By Mr. Boldt): Now, if I get that correctly, prior to the time that Mr. Turk went back to Chicago, all of the business that was done in any of the Western States, California or elsewhere, was funneled through the Washington corporation?

A. That is right.

Q. You had them made and wherever they were sold in the Western States the Washington corporation handled the same—the sale of them?

A. Yes.

Q. And Mr. Turk received a special commission, did he not? A. Yes.

(Testimony of George N. Hughes.)

Q. On business outside of the states of Washington and Oregon? A. That is correct.

Q. But the Washington corporation received a certain portion of the commission, or the profit, on those transactions; is that correct? [98]

A. That is correct.

Q. Now, after Turk got back to Chicago he conceived the idea of shipping to the California people, to the Idaho people, and various other people outside of the States of Washington and Oregon, directly from Chicago?

A. That is correct.

Q. And in that case eliminating the participation of the Washington corporation in the transaction? A. Correct.

Q. And eliminating any profit or commission that you could have derived from those sales?

A. That is correct.

Q. Now, when that was done, an issue was raised between you and Mr. Turk about that?

A. Yes.

Q. And a great deal of correspondence about that was had—that he was diverting this income from the Washington corporation?

A. That is correct.

Q. And throughout your correspondence and discussions with him, what was his position with reference to the money he was diverting away from the Washington corporation?

A. He stated in several letters, I don't recall how many, three or four or five, that it was a

(Testimony of George N. Hughes.)

matter of saving on bookkeeping and assuring me we would receive our share [99] of the profits.

Q. Did you ever receive it?

A. Never received any.

The Court: Do you have those letters?

The Witness: Yes; we have them here.

Mr. Boldt: Yes, we have them here. Several were introduced at the Clark County trial.

Q. (By Mr. Boldt): Did the Washington corporation receive a penny from those shipments diverted by Turk to the other States?

A. No; none whatever.

Q. That was one difference between you?

A. Yes.

Q. What was the other one?

A. The price question.

Q. Explain that, a little more. It is clear to you but the Court doesn't know. Explain to the Court how that affected you.

Mr. Snow: May I ask that the witness speak up. I missed the last two questions.

Mr. Boldt: Why don't you come over here?

Mr. Snow: I am as close as I can get.

Mr. Boldt: He is talking to the Court.

A. As an illustration, we have one particular unit that we sell, our number 106, and our previous price had [100] been. early in the game, six and a half; and it was raised to seven, and at the time I bought him out they were seven-fifty each, and Mr. Turk began to charge me ten dollars instead of \$7.50, to put me in the same class as other state

(Testimony of George N. Hughes.)

distributors and, of course, at that time we were selling to jobbers as well as to dealers.

Mr. Snow: That is not entirely correct.

Mr. Boldt: Let me see if I can get this pin-pointed down.

Q. (By Mr. Boldt): The product itself at this particular time was being manufactured back in Chicago? A. That is right.

Q. By this partnership of Soper and Turk?

A. That is right.

Q. Right? A. That is right; correct.

Q. And the Soper and Turk partnership were selling them to you in Washington, the Washington corporation? A. That is right.

Q. At specified prices from time to time?

A. That is right.

Q. Now, prior to the time that this difficulty arose between you, the Soper-Turk partnership was selling these products to you at a given price, say \$7.50? [101]

A. \$7.50.

Q. And then Mr. Turk on his own initiative decided he would raise the price to the Washington corporation? A. That is right.

Q. And he did do that? A. That is right.

Q. What was the percentage? A. $33\frac{1}{3}$.

Q. \$2.50 over \$7.50? A. Yes.

Q. What was his announced purpose in doing that? Was it for the benefit of the Washington corporation? A. Hardly.

(Testimony of George N. Hughes.)

Q. Did he undertake in any manner to provide for the Washington corporation to participate in that increased price? A. No; not at all.

Q. That was for the benefit of the partnership of which he and Soper were partners?

A. That is correct.

Q. Now, those were the two bones of contention between you and Turk? A. That is correct.

Q. The one was the diverting of the product? Diverting of the product away from the Washington corporation and [102] the other was raising the price by some substantial percentage; is that correct? A. That is correct.

Q. And were there any others?

A. No; that is the only two.

Q. Now, for how long a time did you have an interchange of correspondence and argument about this situation, approximately?

A. Probably a year; something like a year.

Q. All right; and it finally culminated in a proposal of buying out the balance of the stock?

A. That is right.

Q. Tell us who did what in that connection?

A. Well, I realized that we were heading for trouble because of these two situations and I wrote Mr. Turk one time, I think in the spring of 1944, that I thought it would be a good idea if he would set a price to either me or what he would take, a price for what either one would take and either one could take over the corporation, whichever way it was decided, and so he came out.

(Testimony of George N. Hughes.)

Q. He came out to Vancouver?

A. He came out to Vancouver, and we made the arrangements to make the deal and I purchased the stock from him.

Q. All right; what was the consideration, in round figures. What was the consideration that he received for [103] the balance of his stock?

A. Approximately thirteen thousand dollars.

Q. And what was the further sum, an additional sum, later to be paid?

A. Approximately six thousand dollars to each of us. I had the same on the books as him, credited to our salaries but not paid.

Q. Now, Mr. Hughes, at the time that you purchased the balance of the stock of the Washington corporation from Mr. Turk and his wife, was there any understanding or agreement or reservation or limitation of any kind expressed by him or by you or in any manner covered concerning any limitation on the right of the Washington corporation to continue using the name "International" on products they were selling?

A. Absolutely none. That was a foregone conclusion that that was what I should be doing.

The Court: Was anything said that it should be, or are you concluding?

The Witness: Well, the business was to be continued the same as it had been under the same name because we were incorporated. I take over his half of the business.

(Testimony of George N. Hughes.)

The Court: Anything said about your trade name?

The Witness: Nothing whatever.

The Court: By neither of you? [104]

The Witness: No; that is right.

The Court: On this thirteen thousand dollars plus, the salary fixed as a consideration, nothing was said about the trade name then?

The Witness: Nothing whatever.

Q. (By Mr. Boldt): Now, the name of the company at that time and at all times had been "International Electric Fence Company, Inc."?

A. That is correct.

Q. And the product you were selling was sold under that name? A. Right.

Q. Now, Mr. Hughes, what, if anything, would you have had in that corporation—what would it have had—if it didn't have the right to sell a product under the name "International"?

A. Practically nothing.

Q. Was there any expression by Turk or you or anybody even remotely suggesting that it should not have the continued right to use the name "International" on the products?

A. No suggestion at that time whatever, at any time, before or since.

Q. Now, as a matter of fact—— [105]

Mr. Snow: Before or since?

The Witness: He notified me later.

Mr. Boldt: That is what I was coming to.

Q. (By Mr. Boldt): When was the first time

(Testimony of George N. Hughes.)

that Turk expressed to you directly, or it came to your knowledge, that Turk claimed you didn't have the right to use the word "International" in your business?

A. Well, it would be in the fall of 1944. I just don't recall the exact date.

Q. Sometime after you bought the corporate stock?

A. Yes, and my recollection is that it was in October or November, somewhere in there.

Q. That was the next thing I was coming to. After you bought the corporate stock from Mr. Turk, another bone of contention then arose between you, didn't it? A. Yes.

Q. And what gave rise to that? Explain what it was

A. I don't know if I know what bone——

Q. I am speaking of the difference that occurred in the fall of 1944, after you had owned the whole of the stock of the Washington corporation.

A. Regarding selling, you mean?

Q. Yes. Regarding the securing of your product and the price of it and so on. [106]

A. I am not quite clear on it.

Q. Was there a time when Mr. Turk refused to sell you any more equipment? A. Yes.

Q. That is what I am talking about.

A. I didn't understand.

Q. All right. When was it?

A. We have the papers here. I don't recall the date. Along in October, I believe.

(Testimony of George N. Hughes.)

Q. 1944? A. 1944; I think so.

Q. Now, tell the Court what brought about that, his refusal to furnish you with fencers? Why did he refuse to furnish them to you?

A. We were in disagreement about the cost of the controllers. I argued that we would do more business to lower our price rather than raise. I gave him an order for so many at \$7.50 or a lesser order if he charged me \$10. Then he refused the order and sent me a letter saying I would not have the right any longer to sell electric fence products.

Q. After he told you that, after your refusal to pay that price, you procured your future needs from Mr. Soper's organization in Minneapolis?

A. That is correct. [107]

Q. And since that time down to the present, Mr. Soper's concern has supplied you with the products that you distribute? A. That is correct.

Q. Now, Mr. Hughes, I believe that sometime after acquiring all of the stock in the Washington corporation, you filed in various states a registration of the trade name, did you not?

A. I did.

Q. And——

Mr. Boldt: To avoid multiplicity in the record, may the witness step down and get the certificates, your Honor?

The Court: Yes.

Mr. Boldt: Would you get the original certificates?

(Testimony of George N. Hughes.)

The Court: I am wondering if you can't stipulate to that.

Mr. Snow: I am willing to stipulate but I would like to see them. If he has the certificates, I am perfectly willing to stipulate.

The Court: Well, will you get into the record when they were filed. I thought it would save burdening the record with all the exhibits if you stipulated the facts involved. [108]

Mr. Boldt: Yes.

Mr. Snow: Your Honor, while we are waiting for this material, I have not objected to the form of questions that counsel has been purporting here on the assumption he is only trying to do a job of informing the Court on the facts, and I assume that counsel for Defendant will have the same courtesy and I will be allowed to follow the same procedure without interference of objection to the form of the question. Is that agreeable?

Mr. Boldt: That is a little hard to say.

The Court: The court can not discriminate between counsel on either side on the rules of evidence. I want to get at the gist of things.

Mr. Snow: That is what I thought.

The Court: This is a trial on a trade name. There is in favor of the plaintiff the fact that he has an official registration from the Patent Office, but I am still confronted with the problem of determining whether he has a right that is prior both in time and in general equitable rights.

Mr. Boldt: I have no objection to going to any

(Testimony of George N. Hughes.)

phase of it, only I thought it was fair to call attention to the fact that we are all bound by these written documents but to go back of them is perfectly agreeable to me, because—— [109]

The Witness: I have it now.

Mr. Boldt: The record may show at this point that the Defendant corporation registered, or filed for registration, the trade mark “International,” applied to electric fence controllers controlling electric current applied to fences or fence wires, stock rods——

Mr. Snow: It is immaterial; it is the same line of questions.

Mr. Boldt: On the following dates: April 20, 1945, in the State of Washington.

Mr. Snow: That isn't correct.

Mr. Boldt: Filed for record.

Mr. Snow: Why don't you have the issue date and the record number.

Mr. Boldt: I am talking about the State of Washington. Was filed for record in the office of the Secretary of State of the State of Washington on April 20, 1945. Correct? And in the State of Idaho, June 28, 1945. And June 7, 1945, in the State of California. August 6, 1945, in the State of Utah. October 11, 1945, in the State of Nevada. July 24, 1945, in the State of Montana. October 18, 1945, in the State of Wyoming. October 29, 1945, in the State of Colorado. November 13, 1945, in the State of Texas.

Mr. Snow: November what? [110]

(Testimony of George N. Hughes.)

Mr. Boldt: November 13, 1945, in the State of Texas.

May the record show that the dates recorded are as shown in the original exhibits?

Mr. Snow: So agreed.

The Court: All right.

Q. (By Mr. Boldt): Now, Mr. Hughes, when these were, when these filings were made, they were made on the name "International"?

A. That is correct.

Q. And in some instances the label was attached?

A. Yes; that is right.

Q. And they had it in the script form?

A. That is right.

Q. Now, I notice on one or two of these files there are the words, "Reg U S Pat Off."

A. Yes.

Q. Had you at that time also made an application to the United States Patent Office for this?

A. Yes; we had.

Q. And do you recall the date of your application?

A. No; I don't recall the date.

Mr. Boldt: Will you concede, Counsel that it was prior—— [111]

Mr. Snow: No; I won't concede.

The Court: It is sufficient for my purpose that he made an application in the year——

Mr. Boldt: I want to bring out, if your Honor please, that Mr. Hughes made application in the

(Testimony of George N. Hughes.)

United States Patent Office prior to the application of Mr. Turk, the one now in question, by several months as I recall it.

The Witness: Yes.

Mr. Boldt: We will get the exact date.

The Court: There is no use trying to prove that by oral testimony. We have in evidence the permit, or recognition by the Patent Office, showing the date when the application was made.

Mr. Boldt: That is right.

Q. (By Mr. Boldt): And when Mr. Turk's application was made, it was made after your application, was it not?

A. That is right.

Q. And when he made his application he recited one day prior to the day you had specified in yours as being the day of priority of use?

A. That is correct.

Q. You had fixed it as January 2nd and he fixed it January 1st, and his day was one day ahead of the date you specified in yours? [112]

The Court: One day ahead of what?

Mr. Boldt: As the date of original use.

The Court: Oh, all right.

Mr. Snow: I think it is too incomplete, your Honor. He ought to specify. He says he did it but he doesn't show anything.

The Court: If you have some document.

Mr. Boldt: Oh, yes. Of course.

Q. (By Mr. Boldt): You have your application here?

(Testimony of George N. Hughes.)

A. That is in the Charles W. Hills office in Chicago. We have correspondence there.

Mr. Boldt: You probably have it in your file.

Mr. Snow: For the purpose of this trial, if they are going to rely on anything like that, I think that this application that he claims to have filed, I will admit that it was filed and was filed on March 12, 1945, but I also want to state that the application is still pending in the United States Patent Office.

The Court: And Mr. Turk filed his application on what date?

Mr. Snow: He filed on the 20th day of August, 1945. That is the filing date.

Mr. Boldt: You concede for the record then that Hughes' filing was March, 1945, and Turk's filing in [113] August, several months later?

The Witness: That is correct.

Mr. Boldt: Mr. Snow just stated those dates and I will take them as correct.

Mr. Snow: It is from the Patent Office.

Mr. Boldt: You acknowledge it?

The Court: Let's proceed.

Mr. Boldt: Now, is it not correct that from your file that you fixed the date one day prior to the date specified in Mr. Hughes' application as the date of original use.

Mr. Snow: I didn't handle the application.

Mr. Boldt: I will ask you if it is not so.

Mr. Snow: I am not on the witness stand.

Mr. Boldt: You object to it?

(Testimony of George N. Hughes.)

The Court: Let's proceed. He doesn't want to stipulate on that issue.

Mr. Snow: Yes; I have checked it, your Honor. It is true. One date is, January 1, 1938, Mr. Turk's certificate registration, and Mr. Hughes' is January 2, 1938.

Q. (By Mr. Boldt): In other words, Mr. Turk picked a Holiday and you picked the first business day?

The Court: I think you can agree that they didn't know each other—— [114]

Mr. Boldt: Oh, yes.

The Court: ——in 1938.

Mr. Boldt: In 1945.

The Court: I thought he said 1938.

Mr. Snow: I did. 1938.

The Court: When they began to use the trade name.

Mr. Boldt: Oh, yes your Honor but the date of the application——

The Court: I understand that, but when they began using the trade name, these men didn't know each other.

Mr. Boldt: That is right. They didn't know each other at that time, but the point I was concerned with now is to what——

The Court: Were you using this name in January of 1938 and selling these products?

The Witness: Not personally but only as I bought Mr. Turk's right through the corporation and he transferred it to the corporation.

(Testimony of George N. Hughes.)

The Court: I see.

Mr. Boldt: They were both basing their claim on the same original use but in the one case Mr. Hughes used the date January 2nd because it was a non-holiday and Mr. Turk used January 1st.

The Court: I don't care for an argument now. I am going to take the afternoon recess now. This case will [115] be at recess for twenty minutes now.

(Whereupon, at 3:10 o'clock, p.m., January 13, 1949, a recess was had until 3:30 o'clock, p.m., January 13, 1949.)

(Counsel heretofore noted being present, the following proceedings were had.)

The Court: You may proceed.

Mr. Boldt: Yes. Mr. Hughes.

Q. (By Mr. Boldt): Well now, to clarify the point we were last speaking about, Mr. Hughes, the use of the name "International" that you predicated your application on, was the use of your predecessor, namely Turk's use, was it not?

A. Yes; that is right.

Q. It, of course, is the same use that he refers to in his application; that is right is it not?

A. Yes.

Mr. Snow: Yes.

Mr. Boldt: Yes.

Q. (By Mr. Boldt): Now, after that time, were there any other transactions of any kind between you and Mr. Turk excepting the litigations in the Clark County case and so on?

(Testimony of George N. Hughes.)

A. No; no other business transactions.

Q. No other transactions except that?

A. That is right. [116]

Q. Now, after the time you bought out the balance of the stock in the Washington corporation, what change did you make in the label, in the tags and labels, that you were using?

A. We had a new type. It is shaped differently and a little different wording, including our own name only instead of Chicago and New York.

Q. As far as the wording and content of it, you deleted the names New York and Chicago and continued with the word Vancouver, Washington, as had been used prior to that time?

A. That is right.

Mr. Snow: Will you please ask the witness to speak up and give the date?

Q. (By Mr. Boldt): Give us the date of the change deleting the words Chicago and New York.

A. I couldn't say as to that. It was sometime after we made the deal and I bought him out, but I couldn't say just exactly as to the time because it took sometime to have them printed.

Q. It was the next use of labels after you bought him out?

A. After we disposed of what we had on hand. It took us almost two years to get rid of the stock on hand when [117] I bought him out, but as soon as we got the new stock and got rid of the old stock, we began to use them.

Mr. Boldt: I see. Now, I think that probably concludes my direct examination.

(Testimony of George N. Hughes.)

Mr. Snow: May I have Exhibits 12, 7, 6 and 5?

Cross-Examination

By Mr. Snow:

Q. Mr. Hughes, on direct examination you stated that you had been using labels that have been identified in this case as 12, 7, 6 and 5. I would like to show you Plaintiff's Exhibit 12, and Plaintiff's Exhibit 5, and ask you whether or not those are the labels that you were using after July 1, 1944?

A. This? Let's see. Yes. All three of them are ours and used after that date.

Q. When did you begin using those labels, Mr. Hughes?

A. The question I answered a while ago, I don't know the exact date we began using them, any particular label, for the reason we had a lot of stock on hand and used that up first and then when we got in new stock and got in new labels these were applied.

Q. I believe you testified it took you about two years. That would be about July, 1946, that you used those?

A. On one particular unit. [118]

Q. One particular unit?

A. Yes. 106. That is the one we had the large stock of.

Q. Do you have any labels for any of the other units?

A. Well, these are all for—these two metal ones are both for—different units. One is 44 D and the

(Testimony of George N. Hughes.)

other is 44-11. That is different from 106. That is a different type fencer.

Q. Did I understand you to say, that you did not use—this label in your hand, you began using after July 1, 1946?

A. Oh, yes; afterwards.

Q. Afterwards? A. That is correct.

Q. Now, I hand you Plaintiff's Exhibit 7 and Plaintiff's Exhibit 6 and ask you if you ever used those labels on your products?

A. Yes; we have used these.

Q. When?

A. These were the type of labels that Mr. Turk and Mr. Soper placed on the units, these controllers, prior to the time that I bought him out; prior to July 1, 1944.

Q. And how long did you use them Mr. Soper—Mr. Hughes?

A. As I said before, until they were used up.

Q. So that you used those labels then from July—they [119] were in use prior to July 1, 1944, and subsequent to July 1, 1944; is that correct?

A. Yes. We had over three thousand units on hand and it took us quite a while to sell them all.

The Court: What is the difference between the labels?

The Witness: These have Chicago, New York and Vancouver, Washington; and our state Vancouver, Washington.

The Court: Is that the only difference?

(Testimony of George N. Hughes.)

The Witness: That is practically the only difference.

Q. (By Mr. Snow): The description "International" on all of those labels is identical, is that correct, Mr. Hughes? A. That is correct.

Q. You saw these labels, Mr. Hughes, so that I don't have to hand them to you, what I am reading off here is on the labels? A. Yes.

Q. On Plaintiff's Exhibit 5, under the word "International," the words "trade mark" appears. What do you claim as to that?

A. We claim that was our trade mark.

Q. You claim that was your trade mark—from when to when, sir? [120]

A. From the time I purchased it. Well, really, from the time of the incorporation, when I went into the corporation, it was a trade mark of the corporation.

Q. Now, I call your attention to Plaintiff's Exhibit 11, which is this unit, will you look, are you familiar with the label on there?

A. Yes; I am familiar with it. It is our label.

Q. What appears under the word "International" on that label? A. "Reg US Pat Off."

Q. Do you know what that means, Mr. Hughes?

A. Do I know what that means?

Q. Yes, sir. A. Yes, sir.

Q. What does it mean?

A. Registered United States Patent Office.

Q. When was that first put on?

(Testimony of George N. Hughes.)

A. Sometime after I purchased Mr. Turk's stock.

Q. Wouldn't it be after July 1, 1946?

A. 1946.

Q. That is two years after you say you bought out Mr. Turk that you needed that two year period to sell the materials——

A. We had so many over so that I don't remember when we purchased material for this model.

Q. You never did have a trade mark registered in the United States Patent Office, did you, Mr. Hughes, when you put that insignia on there?

A. No. I could explain that to the Court if he is desirable.

The Court: All right. Go ahead and tell us.

The Witness: We applied, we made our application for a trade mark to the Charles W. Hills Company, a large firm in Chicago, of attorneys and subsequently he told us our application for this trade mark had been received and he gave us a five or six figure serial number. We were a little at fault on that but my understanding was that our application for the registration had been accepted and I thought that that meant that that was our number. So, we had our labels printed.

The Court: I think that is sufficient.

The Witness: That is why we did it, exactly. We found out a few months afterwards it was wrong.

Q. (By Mr. Snow): Then that would be, as I take it, about March, 1945?

(Testimony of George N. Hughes.)

A. Approximately. Probably.

Q. Do you have a copy of that letter?

A. What letter is that.

Q. That you are talking about that Mr. Hill's firm [122] sent you that you mistook for being the certificate of registration.

A. I have it; but not here.

Q. Do you recall the contents of that letter?

A. No. It was a long drawn out correspondence we had with them and I don't recall that. It was to the effect that serial number—a five or six number—had been accepted.

Q. Had been filed, didn't it say?

A. Accepted as I recall it, and I thought that our registration had been accepted so that I had these labels printed and when we found out we filed them off but I didn't know it for sometime.

Q. I hand you Plaintiff's Exhibit 12 and ask you if that is how you ground over that?

A. Yes. That is the way we did it. We filed the legend off.

Q. When did you discover that you were wrong, Mr. Hughes?

A. If I remember right, it was about the time we heard that Mr. Turk had made an application and it had been accepted some months afterwards.

Q. Who informed you?

A. Mr. Hill's company in Chicago, I think, did. Charles W. Hills Company. [123]

Q. And that would have been approximately in October, 1946, is that correct?

(Testimony of George N. Hughes.)

A. It was earlier than that, I think. I recall that it was some other letter, I believe. I was notified to that effect and we turned it over to the Hill's Company for reply since they were our attorney.

Q. You turned what over? You confused me.

A I think we received some other notice from some other attorney in Chicago. I believe it was Chicago, which we turned over then to the Hills Company for reply and they were acting as attorneys on the patent matters and we made no reply at all and turned it over to the Hills Company and I presume that may have been the first notice.

Mr. Snow: Will the Clerk please mark this for identification as Plaintiff's Exhibit——

The Clerk: Plaintiff's Exhibit Number 13 marked for identification.

(Document referred to marked Plaintiff's Exhibit Number 13 for identification.)

Q. (By Mr. Snow): I hand you Plaintiff's Exhibit 13 and ask you if that is a copy of the letter which you have been referring to?

A. Yes, that is what I refer to. I think this came before the Hills Company notified us.

Mr. Snow: I would like to offer that in evidence, your Honor.

Mr. Boldt: No objection.

The Court: It will be admitted in evidence.

(Plaintiff's Exhibit Number 13 for identification received in evidence.)

(Testimony of George N. Hughes.)

PLAINTIFF'S EXHIBIT 13

April 4, 1945.

International Electric Fence Co., Inc.,
2215 Main St.,
Vancouver, Washington.

Att. Mr. G. N. Hughes.

Gentlemen:

My client, International Electric Fence Co., Inc., of this city, an Illinois corporation, informs me that you are using the same name as that of my client and selling the same products and also applying to these products the word "International" as a trade-mark.

This is to notify you that my client has prior and exclusive rights in the name "International" as applied to electric fences as a trade-mark and also to the word "International" used in any way in connection with the sales and distribution of these fences.

This letter is being sent to you as a preliminary warning notice to apprise you of my client's rights and claims in this connection, and to request that you immediately desist from any further use of the name "International" both as a corporate name and as a trade-mark in connection with the sale of electric fences.

Unless I have a reply from you in the affirmative within two weeks, I have instructions from my client to proceed with further and more drastic

(Testimony of George N. Hughes.)

measures, which would undoubtedly be in the way of a suit in the Federal Courts, asking for an injunction and an accounting for any past damages which you have caused my client in this connection.

Very truly yours,

ALBERT J. FINE.

AJF:ij

cc:

International Electric
Fence Co., Inc.,
Chicago, Ill.

Admitted Jan. 13, 1949.

Q. (By Mr. Snow): When you filed your application for registration of the mark "International", in the Hill office, Mr. Hughes, did you sign the application for registration?

A. I imagine I did as far as I recall. I don't really recall filing it but I must have. I did whatever the attorneys asked me to do so that is about all I recall about that.

Mr. Snow: Will you please mark this for identification as Plaintiff's Exhibit 14?

The Clerk: Plaintiff's Exhibit Number 14 marked for identification.

(Document referred to marked Plaintiff's Exhibit Number 14 for identification.)

Mr. Snow: And Counsel for the Defendant says he has no objection to the entry of this in evidence, your Honor.

The Court: It will be admitted.

(Testimony of George N. Hughes.)

The Clerk: Plaintiff's Exhibit 14 admitted.

(Plaintiff's Exhibit Number 14 for identification received in evidence.)

PLAINTIFF'S EXHIBIT No. 14

1945

T.M. Ser. No. 480,826

Trade Mark Application of:

International Electric Fence Co., Inc. of Vancouver, Washington

For: Electric Fence Controller for Controlling the Electric Current Supply to Fences and/or Fence Wires

Application Filed Complete Mar. 12, 1945.

Examined and passed for publication Oct. 22, 1947.

Published in O. G. Nov. 18, 1947.

Attorney: Charles W. Hills, 1414 Monadnock Block, Chicago, Illinois.

(Class 21—Electrical Apparatus, Machines & Supplies.)

Claims use since Jan. 2, 1938.

Contents: Application papers—

1. Rejection May 10, 1945.
2. Letter June 16, 1945.
3. Letter Aug. 20, 1945.
4. Letter July 24, 1946.
5. Rejection Dec. 10, 1946.

(Testimony of George N. Hughes.)

Plaintiff's Exhibit No. 14—(Continued)

6. Letter & 6 Add. Spec. Sept. 20, 1947.

7. N. of P. Oct. 22, 1947.

References:

T.M. 296,338 National Battery Co.

T.M. 424,467 Richard H. Turk dba

International Electric Fence Co.

Referred to in Paper No. 2:

T.M. 294,922 International Radio Corp.

T.M. 393,232 Rocke International Electric Corp.

PETITION AND STATEMENT

To the Commissioner of Patents:

International Electric Fence Co., Inc., a corporation duly organized and existing under the laws of the State of Washington, located and doing business at 2215 Main Street, Vancouver, Washington, has adopted and used the trade mark shown in the accompanying drawing for Electric Fence Controller for controlling the electric current supply to fences and/or fence wires, in Class 21, Electrical Apparatus, Machines, and Supplies, and presents herewith five specimens showing the trade mark as actually used by applicant upon the goods and requests that the same be registered in the United States Patent Office in accordance with the Act of February 20, 1905, as amended.

The trade mark has been continuously used and applied to said goods in applicant's business since January 2, 1938.

The trade mark is applied or affixed to the goods

(Testimony of George N. Hughes.)

Plaintiff's Exhibit No. 14—(Continued)

or to the containers for the goods by means of metal or decalcomania labels upon which the trade mark is shown.

The undersigned hereby appoints The Firm of Charles W. Hills (consisting of Charles W. Hills, Carlton Hill, Alexander C. Mabee, Benjamin H. Sherman, Charles F. Meroni, J. Arthur Gross and Donald J. Simpson), of 1414 Monadnock Block, Chicago, Illinois, Registered No. 11,749, its attorneys to prosecute this application for registration with full power of substitution and revocation, to make alterations and amendments therein, to sign the drawings, to receive the certificate of registration, and to transact all business in the Patent Office connected therewith.

INTERNATIONAL ELECTRIC
FENCE CO., INC.

By /s/ G. N. HUGHES,
President.

DECLARATION

State of Illinois,
County of Cook, ss.

G. N. Hughes, being duly sworn, deposes and says: That he is the President of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade mark sought to be registered; that no other persons, firm, corporation or association to the best of his knowledge or belief, has the right to use said

(Testimony of George N. Hughes.)

Plaintiff's Exhibit No. 14—(Continued)

trade mark in the United States, either in the identical form or in any such resemblance thereto as might be calculated to deceive; that said trade mark is used by said corporation in commerce among the several states of the United States; that the description and drawing presented truly represent the trade mark sought to be registered; and that the specimens show the trade mark as actually used upon the goods.

/s/ G. N. HUGHES.

Subscribed and Sworn to before me, a Notary Public, this 9th day of January, 1945.

[Seal] ROYAL T. HANSEN,
Notary Public.

(Seal)

REJECTION

Paper No. 1

May 10, 1945

Registration is refused in view of Trade-Mark 296,338 National Battery Company Aug. 2, 1932.

(International)

RICHMOND,
Examiner.

GS

Paper No. 2

Letter

June 16, 1945

This is in response to Office Letter dated May 10, 1945.

It is noted that registration of the mark is refused in view of the previous registration of the

(Testimony of George N. Hughes.)

Plaintiff's Exhibit No. 14—(Continued)

trade mark "International" and the illustration of a globe which was registered on August 2, 1932, No. 296,338 to National Battery Company of St. Paul, Minnesota, for storage batteries.

Prior to the time that applicant filed its application to register this mark, it made an investigation of previously registered trade marks in the United States Patent Office and noted the registration of National Battery Company and two other registrations as follows:

"International" and Design, registered by International Radio Corp. of Ann Arbor, Michigan, on June 14, 1932, No. 294,922, for radio receiving sets and parts thereof.

"International Electric Corp." etc., registered by Rocke International Electric Corp. of New York, New York, on January 27, 1942, No. 393,232, for radio receiving and radio transmitting tubes, fluorescent light tubes or lamps.

The manufacture and sale of electric fences and the controllers for controlling the electric current supply to such fences is somewhat of a specialized industry, and while in some installations it may be necessary to use batteries, such batteries are merely incidental thereto in the same manner as batteries would be incidental to the operation of radio receiving sets. Accordingly, there is no direct conflict and in view of the fact that the trade mark "International" was very recently registered for radio receiving and radio transmitting tubes, it is sub-

(Testimony of George N. Hughes.)

Plaintiff's Exhibit No. 14—(Continued)

mitted that the trade mark "International" is properly registrable for applicant's product.

Very respectfully,

INTERNATIONAL ELECTRIC
FENCE CO., INC.

By the firm of

CHARLES W. HILLS,
Its Attorneys.

Paper No. 3

Letter

Aug. 20, 1945

Responsive to communication filed June 16, 1945.

Applicant's remarks have been considered carefully.

It is doubted that the registrations to which applicant calls attention constitute any sufficient reason for a withdrawal of the recorded reference.

It is well known that for the electric fence and controller designed for use on farms not serviced with electric power, batteries are sold for use therewith.

RICHMOND,

Examiner.

GS

(International)

Paper No. 4

Letter

July 24, 1946

This is in response to Office Letter dated August 20, 1945.

The Examiner has again rejected the trade mark in view of the previous registration of the trade

(Testimony of George N. Hughes.)

Plaintiff's Exhibit No. 14—(Continued)

mark "International" to National Battery Company for a storage battery under number 296,338.

It is noted on page 370 of the Official Patent Office Gazette of July 16, 1946 that Richard H. Turk, doing business as International Electric Co. of Chicago, Illinois, filed an application to register the trade mark "International" for electric fences on August 20, 1945, under serial 487,342, and this trade mark has been allowed and published in said Official Gazette of July 16, 1946.

It is apparent therefore that a registration of the trade mark "International" to National Battery Company, No. 296,338 has been overcome by argument or otherwise.

It is therefore courteously requested that this present trade mark application be allowed and published in the Official Patent Office Gazette, and after the publication period has expired that an interference be declared between this application and the application of Richard H. Turk, Serial No. 487,342.

Respectfully submitted,

INTERNATIONAL ELECTRIC
FENCE CO., INC.

By the firm of:

CHARLES W. HILLS,
Its Attorneys.

Paper No. 5

Rejection

Dec. 10, 1946

Responsive to communication filed July 24, 1946.

(Testimony of George N. Hughes.)

Plaintiff's Exhibit No. 14—(Continued)

In respect to registration No. 296,338, the same is withdrawn.

Registration certificate No. 424,467 of October 8, 1946 to Richard H. Turk, doing business as International Electric Fence Co., to which applicant calls attention, is now cited as a basis of refusal of applicant's petition.

It appears that applicant is entitled to publication subject to interference proceedings with reference registration No. 424,467.

But it is believed that applicant does not have trade mark use of "International" apart from its use as a part of its name as shown on the specimens of use filed in the case. This is believed to be supported by the view recently expressed by the First Assistant Commissioner in *Airadio Incorporated vs. Airdar Corporation*, 70 U.S.P.Q. 537. For reason here set out registration is further refused.

HENRY WETHERBEE,

Examiner.

(International)

Paper No. 6 Letter & 6 Add. Specs. Sept. 20, 1947

This is in response to Office Letter dated December 10, 1946.

Applicant has obtained a certified copy of the application resulting in registration Certificate No. 424,467, of October 8, 1946 to Richard H. Turk, doing business as International Electric Fence Co. and notes that the specimens filed by Mr. Turk,

(Testimony of George N. Hughes.)

Plaintiff's Exhibit No. 14—(Continued)

identical in all respects with those submitted with this application, were accepted by the Office.

Applicant now encloses herewith five specimens showing the mark as now used by applicant upon the goods and also encloses one specimen (metal name plate) showing the mark as actually used by applicant upon the goods at the time the application for registration was executed and acknowledged and at the time the application was filed.

Applicant now courteously requests that this present trade mark application be allowed and published in the Official Gazette and after the publication period has expired that an interference be declared between this application and trade mark Registration No. 424,467.

Respectfully submitted,

INTERNATIONAL ELECTRIC
FENCE CO. INC.

By the firm of:

CHARLES W. HILLS,
Its Attorneys.

Paper No. 7 Notice of Publication Oct. 22, 1947

The application for the Registration of a Trade Mark filed by International Electric Fence Co., Inc., In Class 21, Ser. No. 480,826 Mar. 12, 1945, (International) has been examined and passed for publication, in compliance with section 6 of the act authorizing the registration of Trade Marks, approved February 20, 1904.

(Testimony of George N. Hughes.)

Plaintiff's Exhibit No. 14—(Continued)

The mark will be published in the Official Gazette of Nov. 18, 1947.

LAWRENCE C. KINGSLAND,
Commissioner of Patents.

Admitted Jan. 13, 1949.

Q. (By Mr. Snow): Mr. Hughes, that paper you have in your hand is—Plaintiff's Exhibit 14 is—a copy of the file wrapper in the patent office of your application that you have been referring to. I call your attention to page—I call your attention to the petition and statement is the first group of papers and ask you if that is the paper you filed? That contains the words "George N. Hughes signed" on the typewriter?

A. This probably is correct; yes.

Q. And you read that before you signed it?

A. No doubt.

Q. And you know that the contents there are true in accordance with the declaration which is the last paper that you have in your hand?

A. Yes, I imagine so. I haven't read all of this now, but I don't recall what was said, but I imagine that is true.

The Court: Let's proceed.

The Witness: Pardon?

The Court: I am advising counsel to proceed. It is admitted in evidence, is it?

Mr. Snow: Yes, it is, your Honor. [126]

Q. (By Mr. Snow): Mr. Hughes, I call your attention to the original certificate of registration

(Testimony of George N. Hughes.)

of your trade mark "International" in the States of Utah and Nevada and Montana and Wyoming and ask you to please identify the labels attached thereto. A. These are our labels.

Q. Do those labels each contain the words, "Registered United States Patent Office?"

A. Most of them. Practically all of them do.

Q. Well, do they all or do they not?

A. Yes.

Mr. Boldt: You mean all of the four?

The Witness: Yes, they do. These are labels we had printed as I said before earlier.

Q. (By Mr. Snow): Now, I hand you a similar certificate of registration from the State of Colorado and the State of Texas and ask you to please look at those labels. Are they the labels that you used at that time?

A. These are some labels we had printed. I don't just recall the date. But, the legend "Registered United States Patent Office" is eliminated and that may be the time that we knew that we didn't have a registration and had to remedy that with the new decals. [127]

Q. Will you answer the question? Do those Colorado and Texas certificates contain the words "Registered United States Patent Office?"

A. No, they do not.

Q. And you previously testified a moment ago that the registration for the State of Nevada contained the words "United States Patent Office"; is that correct? A. That is correct.

(Testimony of George N. Hughes.)

Mr. Snow: The certificate, October, 1945, contains the words registered United States Patent Office for the State of Nevada. The certificate for the State of Colorado was issued subsequent to the issuance of the certificate for the State of Nevada and at that time he still used the registration "Registered United States Patent Office". That is after the date of the first notice that he has been testifying to that he received from Mr. Fee, the attorney in Chicago, notifying him of infringement.

Mr. Boldt: What is that? Are you arguing the matter at this time?

Mr. Snow: No; it is a statement.

The Court: That is all right. He just made a statement.

Q. (By Mr. Snow): Mr. Hughes, you stated on direct examination that you approached Mr. Turk to buy him out. I believe you said [128] it was June of 1944; is that correct?

A. Yes; I think so.

Q. Did you ever attempt to purchase the International Electric Company of Chicago at that time?

A. No.

Q. Never? A. Never did.

Q. You also testified on direct examination that the views of the Washington corporation were to sell electric fencer units not only in Oregon and Washington but also in all the Western States; is that correct?

A. Did the corporation have the right to? Yes.

Q. When Mr. Turk was on the road selling

(Testimony of George N. Hughes.)

electric fencers, while he was a member of the Washington corporation, did he or did he not receive a commission for his sales?

A. He did on part of the sales.

Q. What part, sir?

A. The part outside of Oregon and Washington, which would be California, Idaho and I think that is probably the only two States.

Q. He didn't receive any commission for sales in the States of Oregon and Washington?

A. I don't recall that he did. He may have received some small commissions. I don't recall.

Q. Now, you testified that the corporate minutes—[129] Defendant's Exhibit A-7 contain the statement that there was a copartnership prior to the formation of this Washington corporation. You stated there was such a copartnership, did you not?

A. Yes.

Q. And there actually was one in existence?

A. So far as the legal point is concerned, I don't know about that. We discussed our situation with Mr. Shaffer the attorney and he drew up the papers the way he said they should be drawn and we signed them.

Q. You began to work for Mr. Turk in 1940; is that correct? A. That is correct.

Q. You received a salary from Mr. Turk, did you not? A. That is right.

Q. How long did you receive that salary from Mr. Turk?

(Testimony of George N. Hughes.)

A. Well, part of the time I was not employed by him but, of course, when I worked for him I would receive that salary.

Q. Well, when did you work for him, Mr. Hughes?

A. Well, I think the most of 1940. During the winter, however, as I recall it now, I was absent part time.

Q. And when were you absent? We have got to get some dates here, Mr. Hughes, please. [130]

A. I just don't remember. It has been a long time. I don't recall. I just remembered we were off part time.

Q. What were you doing when you were off part time? A. Around home.

Q. You weren't working for somebody else?

A. No.

Q. You weren't selling electric fencers?

A. No.

Q. Did you ever sell electric fencers before the incorporation of the Washington corporation?

A. Only working for Mr. Turk.

Q. Did you ever go out and sell electric fencers?

A. In the office.

Q. In the office?

A. Yes. In the work shop there; in the repair shop. Quite a number of them.

Q. Were you working for Mr. Turk and receiving a salary from him in January, 1944?

A. No; I was working for the corporation in January, 1944.

(Testimony of George N. Hughes.)

Q. I'm sorry. It is 1941.

A. Yes. I probably was; yes.

Q. Were you working for him and receiving a salary in September, 1941?

A. Well, that is the winter I say I think I was off [131] part time. I don't know definitely about the dates but as I recall if I worked I received a salary.

Q. Were you working for him and receiving a salary in March, 1941?

A. No doubt. That is a busy season.

Q. Were you working for him and receiving a salary in April and May and June, 1941?

A. I think so.

Q. So that you were a salaried employee of Mr. Turk's then prior to the formation of the partnership, of the corporation, the Washington corporation, in July, 1941; is that correct? A. Yes.

Q. And never was a copartnership of any kind prior to July, 1941, was there?

A. As I said, I don't know about that particular part of it, but we explained it to Mr. Shaffer, the attorney, and he said that was the way to draw it up.

Q. Did you ever put any money into Mr. Turk's business before July 1, 1941? October 9, I should say. A. I don't recall that I did.

Q. So that as far as you are concerned, Mr. Hughes, there never was a copartnership excepting insofar as this lawyer Shaffer said there was one; is that it? A. I presume that would be it.

(Testimony of George N. Hughes.)

Q. You never put any money into it and you always drew a salary from Mr. Turk prior to the formation of the corporation; is that correct?

A. That is substantially correct.

Q. I am a little bit confused, Mr. Hughes, and I would like to have you enlighten me, if you will please, as to just what you put into the Washington corporation as your contribution for the stock that you received?

A. The original incorporation?

Q. Yes. A. Two thousand dollars cash.

Q. Is that all?

A. Yes. That was more than half of the value and I put it in.

Q. What did Mr. Turk put in?

A. He had a few accounts receivable and a small stock of merchandise and a few fixtures.

Q. And the valuation?

A. It was, I think, the total was four thousand dollars, Mr. Snow.

The Court: Mr. Turk's contribution was four thousand dollars?

The Witness: That was the total amount and I paid him two thousand dollars for half interest.

Q. (By Mr. Snow): Mr. Hughes, what gave you the idea that you wanted to form, or become an associate with Mr. Turk, in a business way and form this corporation in October, 1941?

A. Because I was interested in the business and Mr. Turk was about to lose it because of financial

(Testimony of George N. Hughes.)

troubles. He was on the point of selling to a Portland man, selling out to a Portland man, and I conceived the idea that in order to keep the thing going if we could raise two thousand dollars for a half interest we might keep it going and in our own hands so that I broached the subject to Mr. Turk and he readily agreed to it and we formed the corporation.

Q. That was in October. Were you employed as Mr. Turk's bookkeeper prior to that time?

A. Yes.

Q. And you took care of his books during the year 1941 prior to October 9th, so that you knew the contents thereof? A. Yes.

Q. Was Mr. Turk as an individual doing business as International Electric Fence Company making any profit in that ten month period?

A. I just don't recall about the profit but I would think so; yes. [134]

Q. Was it one thousand dollars?

A. I don't know about that.

Q. Was it ten thousand dollars?

The Court: He says he doesn't know.

A. Hardly that.

Q. (By Mr. Snow): Was Mr. Shaffer the attorney to whom you have been referring the attorney who had been handling your matters prior to October 9, 1941, or had he been handling Mr. Turk's matters? A. He was my attorney.

Q. He was your attorney?

(Testimony of George N. Hughes.)

A. In small matters. I haven't had much to handle.

Q. But you considered him your attorney prior to October 9, 1941?

A. Yes. I went to Mr. Shaffer.

Q. Now I would like to bring your memory, if we may, back to July of 1944 when you purchased—you stated—Mr. Turk's and his wife's stock in the Washington corporation. Did Mr. Turk—first, how much did Mr. Turk, did you pay Mr. Turk for those two hundred shares of stock that you have testified to?

A. Something over thirteen thousand dollars.

Q. What was the book value of that stock at that time? [135]

A. Well, it was—that would be half—twenty-six and four—probably around twenty-two thousand dollars was the book value.

Q. So that you bought his stock——

A. The total worth I mean to say.

Mr. Boldt: If you want to refer to any data you are perfectly at liberty to do so.

Mr. Snow: Surely.

Mr. Boldt: If there is any data you want to refer to.

Q. (By Mr. Snow): Do you want to refer to it, Mr. Hughes? A. I don't think so.

Q. Did you at that time, when Mr. Turk received apparently thirteen thousand dollars, approximately, for his two hundred shares of stock,

(Testimony of George N. Hughes.)

consider that he wasn't entitled to more than just half of the book value?

A. That he wasn't entitled to more than half of the book value?

Q. Book value of the stock.

A. We agreed to what he was entitled to at the time.

Q. What was that?

A. Thirteen thousand dollars.

Q. Was that all?

A. Excepting a note receivable for his salary up to [136] that time the same as I had.

Q. Was that all, Mr. Hughes?

A. That is all.

Q. Did you ever agree to pay Mr. Turk a definite amount over and above the regular retail or wholesale sales price of merchandise he sent you in order to pay him for the good will which he was giving up to you?

Mr. Boldt: If your Honor please, I don't mind going into this, and we will do it, but this was the very thing debated for four or five days in the Clark County case.

The Court: Oh, he may answer.

The Witness: Will you repeat the question again. I kind of lost track of it.

(Whereupon, material appearing on lines 4 through 7, this page, read by Reporter).

A. There was no agreement whatever on that score. The only thing was—Mr. Turk, as we talked

(Testimony of George N. Hughes.)

it over in a truck outside of the building—it was stated between us, now we were free and independent, and he stated then that he was going to charge me the regular price with fifty per cent discount. Well, that was my only source of supply, just like I was buying from Marshall Wells and Company, and that was his price and I could accept or reject and that was definitely stated at that time. I was simply buying from him as a [137] manufacturer just like I would buy from anybody else.

Q. So that you now state that you did not agree to pay Mr. Turk any premium on the material that you bought from him from Chicago?

A. I simply agreed to pay his price just like any other jobber.

Q. No premium of any kind?

A. A higher price, of course. Any jobber anywhere, it is a higher price.

Q. I am not talking about a higher price. A premium?

A. No premium.

The Court: You mean you were going to recognize him as your jobber for this product?

The Witness: No. He was the manufacturer and he was simply selling to us out on the West Coast and we sold them in turn to merchants or dealers, in other words, and we make whatever price we want and if he wants to charge me more, I have to pay it.

The Court: Why couldn't you go somewhere else and buy them?

(Testimony of George N. Hughes.)

The Witness: Because no one else was making them in those days—"International fencers".

The Court: That is a name. But the thing itself could be made by anybody unless it was limited by act. [138]

The Witness: During the War, however, none was made except by our International people and the prime order competitor was Sears and Roebuck who had somebody making them but very few were obtainable; so I couldn't go and buy from some other source because there weren't any available.

The Court: Proceed. Let me ask this question while I have it in mind. Did it occur to you at the time that you had this conversation in the truck that there might be some duplication, now that you were separated, in the use of the word "International"?

The Witness: I don't recall that phase of it.

The Court: And nothing was said about it?

The Witness: Nothing was said about it; no.

The Court: That is all.

Q. (By Mr. Snow): Do you—well—strike that. When you formed the corporation with Mr. Turk, did that corporation have any exclusive right to sell electric fencers in any particular territory?

A. We had all of the Western States; we had always sold to them.

Q. When you say "we"; who do you mean?

A. The corporation.

Q. You mean—Washington and Oregon, including them?

(Testimony of George N. Hughes.)

A. All the Western States, including Washington and [139] Oregon, wherever we could get the business.

Q. You kept the books for Mr. Turk both before and after the incorporation. Didn't he have distributors set up in other communities besides Vancouver?

A. There were distributors that the corporation shipped to. The corporation itself, but not Mr. Turk. The corporation shipped to and sold to.

Q. Did he have these distributors before the corporation was formed? A. Yes.

Q. What are the names of those distributors?

A. Mr. Clint in California and Wyat in Idaho, and that business was all turned over to the corporation when I bought—when we formed—the corporation.

Q. Calling your attention now to the corporation period, did the corporation receive all of the profits of the sales of equipment to distributors outside of the States of Oregon and Washington?

A. Well, there was always expense to come out of profits and naturally the salaries were paid and commissions paid and the corporation received all of the balance of the profit; yes. The net profit.

Q. What was the price, for instance, of a 106 controller at that time?

A. The list price was twenty dollars. [140]

Q. What was the wholesale price?

(Testimony of George N. Hughes.)

A. We had several price structures. Fourteen dollars to dealers and twelve or eleven dollars to jobbers, depending on quantity.

Q. Let's talk about dealers and nobody else. You say the price was twenty dollars. When was that now? Let's set a time.

A. That is what we were selling for at that time.

Q. The date, please. A. In July, 1944.

Q. Let's go back. I want to go into the corporation period.

A. That was our price for several years.

Q. That was your price for several years?

A. Yes.

Q. It was the same before July 1, 1944, and on July 1, 1944? A. Yes; for two or three years.

Q. That controller sold to the trade for twenty dollars; is that correct? A. The retail trade.

Q. What was the price to your wholesale trade?

A. Fourteen dollars to the dealer.

Q. Fourteen dollars to the dealer?

A. Yes. [141]

Mr. Snow: I am sorry. My thought was interrupted. Was that fourteen dollars?

The Court: Fourteen dollars.

Q. (By Mr. Snow): From twenty, so that left a net of six dollars to the corporation; is that correct? A. No.

Q. What did it leave?

A. Six dollars profit to the dealer when he sold it at retail.

(Testimony of George N. Hughes.)

Q. I am sorry. You are right. I apologize.
What did you pay for them?

A. Seven-fifty; plus the freight, of course.

Q. You paid \$7.50? A. Yes.

Q. I thought you said you sold them for six?

A. No. We sold them for fourteen dollars to dealers; and twelve and eleven to jobbers, depending on the quantity they bought. We had a three-price structure.

Q. Take one of them. Whatever price you want to take. You say you paid \$7.50 for them and sold them for fourteen dollars? A. Yes.

Q. Now, before July 1, 1944——

The Court: You sold direct to the consumer too, [142] didn't you?

The Witness: Very little. We weren't doing retail trade. Wholesale trade. Once in a while someone would come in the shop and buy one.

Q. (By Mr. Snow): So that you had a net there to yourself of about six and a half dollars; is that correct? A. That is correct.

Q. Did that six and a half dollars go into the funds of the corporation? A. Yes.

Q. All of it? A. Yes.

Q. Didn't you pay any salesman's commission?

A. Yes; that would come out of overhead.

Q. Didn't you pay commission on actual sales? If I bought that from you in 1944, July 1st, and paid fourteen dollars for it, and it cost you seven and a half dollars, you made a net of six and a half

(Testimony of George N. Hughes.)

dollars, and say Mr. Bailiff here sold it for you, wouldn't he get a commission on this particular sale?

A. If he was working on commission; yes.

Q. Did you have people working for you on other than commission selling these products?

A. Well, Mr. Turk usually was on the road and anything [143] I sold around there was no commission. As I recall, he didn't get a commission on all of them. He got a commission on the States outside of Washington and Oregon.

Q. That is exactly what I have been trying to get. Will you repeat that, please?

A. I said——

Mr. Boldt: He said it before. He explained it in detail once before.

A. (Continuing): Mr. Turk, when we incorporated, he figured that he was entitled to a little better consideration than one-half interest and we arranged we would pay him commission, which we did.

The Court: On sales outside Oregon and Washington?

The Witness: That is right. But on the balance, the net profit then, went into the corporation and belonged to both of us.

Q. (By Mr. Snow): Now, as I understand, that applied to all sales outside of Washington and Oregon; is that correct? A. That is right.

Q. Did you sell one of the 106's—the corpora-

(Testimony of George N. Hughes.)

tion sell one of the 106's—to Mr. Wyat and Mr. Clint for ten dollars?

A. Quite a few of them for that; yes. [144]

Q. And they cost you \$7.50. That left a total of \$2.50, didn't it? A. That is right.

Q. How was that divided up? Did the corporation get it?

A. Yes. The corporation got it all from them and then we credited Mr. Turk commission on the ten dollars.

Q. How much? A. Twenty per cent.

Q. Twenty per cent? A. Yes.

Q. Twenty per cent of two and a half dollars?

A. No; of ten dollars. It would be ten dollars.

Q. According to my figures, that leaves the corporation fifty cents.

A. On that class sales, yes, but most of our sales were to dealers.

Q. Weren't they dealers?

A. No. They were distributors. They were not even jobbers.

The Court: Let's get along Mr. Snow.

Q. (By Mr. Snow): Mr. Hughes, referring to those number 106's that were sold to California and Idaho, Mr. Clint and Mr. Wyat, were they not sold at retail? [145]

A. Not by us, no. Of course, they were eventually sold retail; naturally. They sold to dealers the same as we did.

(Testimony of George N. Hughes.)

The Court: While counsel is conferring I want to ask some questions.

When you first heard of this type of electric fence—this is a fence charged with electricity and when stock came up they would receive a shock and back away from it and you could use one wire instead of three or four?

The Witness: Yes; that is correct.

The Court: When you first heard of it, was it this particular type irrespective of name?

The Witness: I don't know that it was the very first one but it may have been.

The Court: Your recollection is?

The Witness: It may have been.

The Court: Well, the first time you became interested in this type of an undertaking or business venture, was it one that you saw labelled under a particular label or name?

The Witness: I became interested by working with Mr. Turk.

The Court: That would be 1940?

The Witness: 1940; yes.

The Court: And then did it carry the name "International" [146] on it?

The Witness: Yes; it did.

The Court: And then did you make any inquiry as to any copyright in this name "International"?

The Witness: Made no inquiry but understood obviously—

The Court: I don't care for your understanding.

(Testimony of George N. Hughes.)

Did you have anything from Mr. Turk or anyone else that he had coined the word?

The Witness: He always told me it was his name.

The Court: Not that he had borrowed it from someone else?

The Witness: No. That was the general understanding that that was his business.

The Court: And at the time that you became identified with it as his bookkeeper, this trade name had gained some degree of prominence?

The Witness: To a certain extent. Business wasn't very extensive at that time.

The Court: There were other similar devices with other trade names?

The Witness: That is right.

The Court: I think the deposition had one by the name of Mitchell.

The Witness: That was prior to me. That was Mr. [147] Turk's.

The Court: You never had any of those?

The Witness: They came in for repairs.

The Court: They were called "Mitchells"?

The Witness: No "Mitchells."

Mr. Boldt: A man by the name of Mitchell made them for Mr. Turk.

The Court: Oh, I see. Then it is your understanding and theory that when you formed the corporation whatever value this word "International" had in connection with electric fences or

(Testimony of George N. Hughes.)

electrically charged fences and devices became a property of the corporation?

The Witness: Yes; definitely so. I wouldn't have bought it otherwise. You see, I wouldn't be buying anything with my money; just buying a distributorship.

The Court: The actual book assets at the time of the purchase was only six thousand dollars?

The Witness: Well, you are speaking of July 1st?

The Court: Yes.

The Witness: Yes.

The Court: But when you paid thirteen thousand dollars, you paid for half of the assets—plus four thousand dollars premium or bonus?

The Witness: I paid him \$1.50 each in addition to the invoice value for something over three thousand one [148] hundred and some units.

The Court: That you had in stock?

The Witness: Yes. In other words, he took his profit on the stock on hand.

The Court: And even up to that time neither one of you had mentioned this name "International" insofar as it was applied to this product or the territory?

The Witness: Do you have reference to——

The Court: As to your buying the stock.

The Witness: I know.

The Court: Not what you conclude, but was any reference made between you that he was sell-

(Testimony of George N. Hughes.)

ing you this name because it had, according to your testimony, reached the stage where it had some value?

The Witness: He simply sold me the stock in the corporation and, of course, the value of the corporation——

The Court: I understand very well. You might have assumed you were buying, and he might have assumed that he wasn't selling, the trade name. Was there any discussion between you at that time about the trade name?

The Witness: No; I can't say that there was.

The Court: He didn't say to you that you couldn't use it?

The Witness: No; not at all.

The Court: And you didn't say to him that you were [49] buying it and "you can't go down to Portland or California and start another outfit and use this name 'International' on it"?

The Witness: That is true.

The Court: Neither one of you?

The Witness: That is what I was saying.

The Court: I don't care what you think you were saying. That isn't the point. What actually happened? You got into this difficulty. That is why you are in Court now, as to who owns this trade name. It is not a question of product. It might be that you might using a product under a fancier name than "International," but the whole controversy is over the name. What I am trying to get clear is what, if anything, was said and if nothing

(Testimony of George N. Hughes.)

was said, then we would have to draw inferences from what occurred.

The Witness: I simply bought his stock in the corporation, which I say, I considered took in everything because that was the business. That was our trade name and we built up a value of the stock by intensive advertising and having salesmen on the road. We built up good will and were doing business at that time.

The Court: I don't care for the argument. What I want are some facts and if there aren't any, we would have to decide this on inference that you draw from what did occur. [150]

You may proceed.

Q. (By Mr. Snow): Mr. Hughes, in order that the Court may be a little bit more informed, you did put out electric fencers under another name, did you not? A. No.

Q. Don't you have the name "National"?

A. No. We started to put it out, but we don't now.

Q. Did you ever put any out?

A. Oh, just a very few.

Q. So that you did have another name, "National," that you used at one time in International?

A. That is right.

Q. When you formed the corporation, Mr. Hughes, I would like you to see if you can't remember this—did not Mr. Turk say to you, "Mr. Hughes, as I am selling to Mr. White and Mr.

(Testimony of George N. Hughes.)

Green, and they will become distributors, I will give the corporation a fifty cent piece for everything I sell for handling the bookkeeping of those transactions for Mr. Turk?"

A. That was not the case at all because my own bookkeeping discredits that. We simply paid him a twenty per cent commission.

The Court: You answered the question. It was not [151] the situation?

The Witness: No.

Q. (By Mr. Snow): Did you think in July, 1, 1944, that you were buying as part of the assets of the Washington corporation the trade mark "International"? A. Absolutely.

Q. And you were sure of that at that time?

A. Yes. As near as I could be sure of anything, buying whatever rights the corporation had.

Q. And you at the same time, Mr. Hughes, believed that the Washington corporation was permitted to sell "International" units in any State, including—in all States, including—Washington and Oregon, on July 1, 1944?

A. In the Western States; yes.

Mr. Boldt: I assume you mean if he could get the product to sell.

The Witness: Yes. We didn't cover all the territory because you couldn't supply it.

Mr. Snow: I would like the Clerk to please mark this letter for identification as Plaintiff's Exhibit—

(Testimony of George N. Hughes.)

The Clerk: Number 15.

(Document referred to marked Plaintiff's Exhibit Number 15 for identification.)

Mr. Snow: Which is a letter written on [152] stationery—original letter written on the stationery—of International Electric Fence Company, Inc., dated July 24, 1944, and purportedly signed by Mr. G. N. Hughes. This is July 24th. Wherein it states——

The Court: Well, you better——

Mr. Snow: I am going to have him identify it.

The Court: You can't go into the contents of it though.

Q. (By Mr. Snow): Will you please tell me whether or not you can identify that letter, Mr. Hughes, as having been written by you?

A. Yes, that appears to be a letter from me to Mr. Turk.

Q. You wrote that letter? That is your signature?

The Court: He says it is his letter.

Mr. Snow: O. K.

The Court: Have you seen it, Mr. Boldt?

Mr. Boldt: I would suggest that you give that to the witness and if he wants to follow what he reads——

The Court: Are you going to offer it?

Mr. Boldt: I don't know. Are you going to offer it?

(Testimony of George N. Hughes.)

Mr. Snow: I am going to offer it in evidence as Plaintiff's Exhibit 15. [153]

Mr. Boldt: No objection.

The Court: It will be admitted.

(Plaintiff's Exhibit Number 15 for identification received in evidence.)

PLAINTIFF'S EXHIBIT No. 15

[Letterhead] International Electric Fence Co.

Mr. R. H. Turk,

International Electric Fence Co.

910 - West Van Buren St.

Chicago, Ill.

Vancouver, Washington
July 24, 1944.

Dear Mr. Turk:

I am writing this letter in order that you and I, and perhaps Mr. Soper, may be able to get together on a proposition that may be of inestimable value to the three of us, providing each of us is able to see the thing in a perspective embracing the "long pull," as the stock brokers term it, meaning, of course, the greatest benefit over a long period of time rather than the immediate future, and possibly even in spite of an apparent inadvisable situation insofar as your own immediate business interests are concerned.

In order to clarify the situation so you will be the more able to see my point of view let me refer to some of our past conversations in regard to future expansions of business in the selling of

(Testimony of George N. Hughes.)

electric fence controllers, and accessories. It will readily occur to you that the chief source of any dissatisfaction which I have had with our past set-up in business has been the fact that I have been "hamstrung" for any great increase in business by the fact that I have been limited in territory for selling International fencers, having only Oregon and Washington. All my direct, and indirect, suggestions for giving me more territory in which to sell these fencers have proven of no avail, so I am still thus limited. You know me well enough to know that I could not be satisfied to be tied down to a limited business when I felt I could easily multiply it just by having additional territory in which to sell goods. In view of your not being willing in the past to allow me unlimited territory for such selling, (and from now on expecting to charge me 33-1/3% more for all fencers than formerly), I have for some time been toying with and working on the idea of either manufacturing, or having some one else manufacture for us, a New type fencer under a different name so that I could sell it anywhere in competition with all comers, including International. In this way only would I be able to expand my operations to the limit of my ability to sell at a profit.

As to how this would affect you and your business, it is simply this: not long hence, we hope, the war will be over and there will be many John Smiths, Bill Joneses, Sam Whites and any number of other firms in competition with you, and with

(Testimony of George N. Hughes.)

each other, in manufacturing and selling electric fencers. From none of these will you derive a cent of profit, rather it will cut very deeply into your business and profits, if indeed any such profits are left.

In that event why should not I go ahead with my plan above mentioned and get in on the ground floor? The competition I would give you in the other states would only be that much taken from the others anyway. In other words, if there is a total of 100 manufacturers, or national distributors, in the country I might as well get my 1% of the business while you and the other 98 firms are each getting their 1%, rather than for me to settle back contented and let you still get only your 1% and 99 others each get their 1% of the national business. It will make very little difference to you whether I am one of your competitors, out of so many, or my place is taken by some other firm. The competition will be there just the same, with practically no discernible difference.

Assuming at first that you not only would frown upon but would probably decidedly object to such a venture on my part I had tentatively decided to look into the manufacturing possibilities myself or to have someone else supply my needs in this respect, with the exception of International fencers, of course, which I would expect to continue to handle, either on the same basis as at present or under a more extensive proposition as might be agreed upon.

(Testimony of George N. Hughes.)

However, after considering the matter for some time, it occurs to me that possibly this could all be worked out to our mutual advantage, and this is where the "long pull" comes in. I am wondering whether or not you would want to come in on the proposition, in the event something could be worked out, possibly under some arrangement similar to what we had before I bought you out here and after you and Mr. Soper divided your businesses there. My thought here is that possibly it could be arranged to have Mr Soper manufacture, assemble and furnish me the contemplated new unit while you would assemble and furnish me with the International line as in the past, possibly with an enlarged territory. I would not object to leaving Idaho out of the picture as far as any additional territory would be concerned.

As to the new line of fencers, I would be the one and only distributor of these types and models which might be designated from time to time. In other words the new name and types would be my own personal property and not to be sold to anyone except through me.

As to price, this would have to be on the same approximate basis as we have always worked in the past in order that I might be able to interest jobbers in handling the fencers all over the country. Because of the immensity of the job to be undertaken there would be no other adequate way of getting national distribution during our lifetime.

(Testimony of George N. Hughes.)

This would mean less profit per item to each of us but the volume would more than compensate, if it went over at all. These grocer chain store jobbers operate on a net of not to exceed 2% profit, so I imagine you could get along O. K. with the margin of profit enjoyed in the past, or even less.

In the event the foregoing ideas should appeal to each or both you and Mr. Soper, or to one and not the other, a proper agreement could be drawn up and executed embodying the general ideas suggested and any others which might be suggested later, as the proposition is discussed between us.

It is quite possible I might arrange to go to Minneapolis and Chicago in the near future at which time all these suggestions could be discussed between us.

I will be very much interested in having your views on all the subjects referred to in this letter, and anything else that might occur to you which would be pertinent to thoughts under consideration.

Yours sincerely,

/s/ G. N. HUGHES.

Admitted Jan. 13, 1949.

The Court: Proceed.

Q. (By Mr. Snow): I call your attention to the first page, starting about half way down, beginning with the words, "It will readily . . ." Do you find that, Mr. Hughes? A. Yes.

Q. Where you state, "It will readily occur to

(Testimony of George N. Hughes.)

you that the chief source of any dissatisfaction which I have had with our past set-up in business has been the fact that I have been 'hamstrung' for any great increase in business by the fact that I have been limited in territory for selling International fencers, having only Oregon and Washington." "All my direct, and indirect——"

The Court: Are you omitting something there?

Mr. Snow: No; I am not. I am continuing.

Q. (By Mr. Snow) (Continuing): "All my direct, and indirect, suggestions for giving me more territory in which to sell these fencers have proven of no avail, so I am still thus limited. You know me well enough to know that I could not be satisfied to be tied down to a limited business when I felt [154] I could easily multiply it just by having additional territory in which to sell goods."

The Court: Any questions you want to ask in reference to that?

Mr. Snow: No. He identified it, and——

Q. (By Mr. Snow): Did you make that statement in that letter?

The Court: And if there is any explanation you can make it now.

A. The explanation is that the corporation previously, why, had been selling to these Western States and when Mr. Turk went back to Chicago he arbitrarily began to limit me, my territory, by taking away trade that we had had all the time

(Testimony of George N. Hughes.)

up until the time he went to Chicago and then he began to ship direct and eliminate us.

The Court: Was that before you bought him out?

The Witness: After.

Mr. Snow: This was after. July 24th.

Mr. Boldt: And it is reciting the grievances that he had in the past.

The Witness: That is right. He was still limiting us to Oregon and Washington and shipping direct to these other places.

The Court: All right.

Mr. Snow: Will the Reporter (Clerk) please mark [155] this letter as Plaintiff's Exhibit——

The Clerk: Number 16 marked for identification.

(Document referred to marked Plaintiff's Exhibit Number 16 for identification.)

Mr. Snow: This letter, your Honor, is a letter written by the International Electric Fence Company, dated July 31, 1944, and signed by Mr. Hughes.

Q. (By Mr. Snow): Mr. Hughes, I hand you this letter and ask you if you can identify it?

A. Yes; this is one of my letters.

Q. Is that your signature and did you write that letter? A. That is right.

Q. I call your attention to the first paragraph on page 2 of that letter wherein you state: "You can rest assured I am not planning on dropping International fencers in Oregon and Washington." Did you make that statement?

(Testimony of George N. Hughes.)

A. I must have if the letter is there. I don't recall it.

Mr. Snow: Will you please mark this letter for identification as Plaintiff's Exhibit——

The Clerk: Exhibit Number 17 marked for identification.

(Document referred to marked [156] Plaintiff's Exhibit Number 17 for identification.)

Mr. Snow: I would like to offer this letter, Plaintiff's Exhibit 16, in evidence.

Mr. Boldt: No objection.

The Court: It will be admitted.

(Plaintiff's Exhibit Number 16 for identification received in evidence.)

PLAINTIFF'S EXHIBIT NO. 16

[Letterhead] International Electric Fence Co.
Mr. R. H. Turk,
910 West Van Buren St.
Chicago, Ill.

Vancouver, Washington
July 31, 1944.

Dear Mr. Turk:

I am afraid I will have to say "the expected has happened," meaning I was apprehensive you would misinterpret parts of my letter of the 24th, due to my inability to properly express my thoughts, and that as a result you might resent, or at least not approve of, my suggested plans for enlarging the business. This possible situation was hinted at in

(Testimony of George N. Hughes.)

the first paragraph of the above mentioned letter.

It was my intention to assure you that, contrary to your apparent assumptions, it was my hope to both enlarge and make more profitable your own business in the long run as well as my own business here. I feel sure this can be done if you can see your way clear to cooperate with me in building up a national business, rather than confining it to certain sections as at present.

If you will recall when you were here the trip before the last one, around May 1st, I believe, you and I had practically agreed upon the plan of my being given several states to work, including nearly all the west and southwest, and that I was to be paid a commission of \$1.00 per unit for all sales in that territory to take the place of my share of the loss to the firm due to your proposed increase in the price of units of approximately 33 $\frac{1}{3}$ %. You made the trip to California, my assumption being that you would come to some kind of an understanding with Mr. Klint to the effect that I would have general supervision of the sales of this enlarged territory and that you would stop on your way back, at which time final arrangements would be made for so enlarging our business. However it was quite evident you did not intend to go through with these arrangements, since you did not stop off to see me and did not again refer to our conversations. Under the circumstances I did not force the issue, leaving it to you to make the ad-

(Testimony of George N. Hughes.)

vances in any further discussions, it being your move.

Since it was thus apparent that you could not see your way clear to allow me more "growing room," or a chance to expand my business, as suggested in my former letter I had to make my own plans for any possible increase in such business. There was no other way. At that time I would have preferred confining my interests to International but due to above circumstances it was necessary to figure out some other way, or gradually fade out.

Regarding your anticipated profits, as heretofore explained, if you can see eye to eye with me on the possibilities involved in the proposed changes I fully believe you will do more business than you have ever done before. If I am able to carry through my present plans, and we can work together on the proposition, I can see no good reason why your business should not be multiplied. You can rest assured I am not planning on dropping International fencers in Oregon and Washington. I believe you will have to acknowledge I have done fairly well in these two states, and it was my expectation to at least do the best I could in others.

In reference to the note covering past due salary which was to be deposited in the bank in escrow, this will be taken care of soon. The reason for the delay is that I have been planning on disincorporating at the end of this month, in which case the note should be signed by me individually, as

(Testimony of George N. Hughes.)

suggested by you, rather than by the corporation. However on further consultation with my attorney I believe I will let the matter ride as is for awhile anyway. We will see how it works out. After consulting further with the auditing company which was working with me on the proposed change-over I will probably deposit the note within the next few days, if they will have time to run off the escrow agreement.

We inclose our check for \$99.23 which pays up our account in full to date.

Sincerely yours,

/s/ G. N. HUGHES.

Admitted Jan. 13, 1949.

Q. (By Mr. Snow): Mr. Turk (Hughes), I hand you Plaintiff's Exhibit 17, marked for identification, and ask you if you can identify that letter? A. Yes; that is one of my letters.

Mr. Boldt: I said, "no objection." Of course, I meant to the identity. You understand my position with reference to the parole evidence rule. I take it I need not repeat that all the time.

The Court: Yes.

Q. (By Mr. Snow): Did you answer my question, Mr. Hughes? Was this written by you and was that your signature?

A. Yes; I answered the question.

Mr. Lyon: What is the date of that letter?

Mr. Snow: This is a letter written by Inter-

(Testimony of George N. Hughes.)

national Electric Fence Company, dated September 9, 1944, to Mr. [157] R. H. Turk.

Q. (By Mr. Snow): I call your attention, Mr. Hughes, to a statement on page two of this letter: "You will probably have little difficulty in recalling that you personally made the statement, while we were seated in the truck across the street, at the time we made our agreement as to the buying and selling deal, that this would leave me free to buy in the open market, but that you would have to charge me fifty per cent of the list price on International fencers."

Did you make that statement?

A. Yes. That is according to what I testified to shortly before——

The Court: I don't think that the question and answer throws much light on the issue, but I would rather have him state now how he happened to make it, or what he had in mind when he made it, that it would leave him free to buy in another field.

Mr. Snow: I thought he testified to that, but I didn't want to burden you with reading the entire letter. I was attempting to call your Honor's attention to extracts but the whole thing is in evidence.

The Court: All right. Go on. Each of these letters that you are offering now are subject to an answer. Do you have the answer? Or, Mr. Boldt, do you have it? [158]

Mr. Boldt: I have been trying to check to see,

(Testimony of George N. Hughes.)

your Honor. There is a long correspondence and very involved between these parties and it is rather hard to pick out the extracts.

Mr. Snow: I believe I offered 16.

The Court: 15 and 16 are admitted.

Mr. Snow: I offer Plaintiff's Exhibit 17 in evidence.

Mr. Boldt: Subject to the general proposition that this thing can't be varied by parole, I have no objection.

The Court: It will be admitted and an exception allowed.

(Plaintiff's Exhibit Number 17 for identification received in evidence.)

PLAINTIFF'S EXHIBIT NO. 17

[Letterhead] International Electric Fence Co.
Vancouver, Washington
Sept. 9, 1944.

Mr. R. H. Turk,
International Electric Fence Co.
910 West Van Buren St.
Chicago 7, Ill.

Dear Mr. Turk:

It has taken us a long time to get around to submitting a final report on the sale of your share of the stock in the company to me. However, here it is inclosed for your files and information. We had the accounting firm somewhat puzzled for a time to make a final and correct statement, and get by

(Testimony of George N. Hughes.)

with the tax proposition and save as much expense as possible.

As it has turned out it was necessary to declare a dividend sufficient to wipe out the surplus account. This has resulted in the figures as contained in the inclosed statement and the income tax statement for the $\frac{1}{2}$ of this year in which you were interested. You will note it resulted in an income tax of \$578.27, one half of which is chargeable to each of us. The company will have it all to pay but instead of asking you to dig up your share of the tax we have indorsed the \$289.13 on the back of your note which is payable at the end of the five year period. In this way it will be no burden to you and will have to be taken care of by us at this end.

Referring to your letter of the 5th, I am somewhat surprised, Mr. Turk, that you would take this attitude in view of all that has passed between us. In answer to your question as to whether or not I would "refrain from buying competitive merchandise," I will not be so brusque as others I have known by saying "the answer is a firm 'No'," but will give my reasons for being compelled to not accede to your implied request for me to so refrain from such buying. In the first place there was never any written, oral or implied agreement that I would not be a free moral agent to buy and sell in the open market from and to whom I pleased, my own interests in each case to govern my own actions. Any such agreement as you evidently request would

(Testimony of George N. Hughes.)

be foolish and indefensible on my part. Under such an arrangement I would be permanently restricted to buy and sell only such items as you could furnish, at your own price, and in addition to that (and I am not saying you Would do it) there would be nothing to prevent you from supplying your other accounts and leave me in the lurch by simply holding up my orders with the statement, or similar, that parts or something else was hard to obtain and you were unable to supply my requirements for some time to come. I would really be holding the bag, in such an event, empty.

You will probably have little difficulty in recalling that you personally made the statement, while we were seated in the truck across the street at the time we made our agreement as to the buying and selling deal, that this would leave me free to buy in the open market, but that you would have to charge me 50% of the list price on International fencers. Both being free agents I could not do otherwise than acknowledge that you had the right, insofar as I was concerned, to charge me any price you saw fit but that could in no way imply that I was compelled to buy any given article from any particular source and have them arbitrarily fix their own price. I did at the time, and do now agree that you may charge me your own price for your merchandise but I, as another free agent, also retain the right to buy or not to buy as I see fit, and to use my own judgment as to what course I should

(Testimony of George N. Hughes.)

follow in the furtherance of the building up of our business here.

Any other course would be not only unthinkable but also disastrous. As to your selling for 40% of the actual value of your share of the business, we both know, of course, that this is imaginary thinking. I hesitate to bring the matter to attention again, it seems so childish, but one would imagine from recent letters received that I personally had nothing to do with building up the "goodwill" of the business here. If you will recall the circumstances under which I bought into this business in the first place, and the number of other times when I and this business here has, as they say, "saved your bacon" I feel certain you surely should have a more charitable frame of mind toward me and the business here in general.

I very much dislike, Mr. Turk, (and I am sure you know this) to bring up any unpleasant subject or to cause any hard feeling in any way, but because of the insistence of your letter and implications contained therein it has seemed necessary to speak frankly in order that there be no misunderstanding as to our respective positions. As you very well know I am loaded up with fence units for some months to come and will be ordering very little, if any, fencers from you in the near future. When I do so order you have the right (unless the OPA rules otherwise) to charge whatever price you charge other jobbers. On the other hand I have a

(Testimony of George N. Hughes.)

perfect right to decline to purchase any one or all articles of merchandise which seem to me to be too high in price, or not advantageous to us to buy for some other reason, or even for no reason at all.

Wishing you and yours the very best of luck,
I am,

Yours very truly,
/s/ G. N. HUGHES,
Manager.

Admitted Jan. 13, 1949.

Mr. Snow: And will the Reporter (Clerk) please mark this letter, which is a letter from the International Electric Fence Company, dated September 20, 1944, addressed to R. H. Turk.

The Clerk: Plaintiff's Exhibit Number 18 marked for identification.

(Document referred to marked Plaintiff's Exhibit Number 18 for identification.)

Q. (By Mr. Snow): Mr. Hughes, I ask you to please look at that [159] letter, Plaintiff's Exhibit 18 for identification, and I will ask you if that is your signature at the end of that letter and whether you wrote that letter?

A. Yes, that is my signature and that is our letter.

Q. You made a statement, Mr. Hughes, a few moments ago, that you never attempted to buy out

(Testimony of George N. Hughes.)

the Chicago corporation, International Electric Company, at any time; is that correct?

A. That is correct. I have never had the means to buy it out.

Q. I call your attention to the letter, Exhibit 18, second paragraph, on page two: "Just to have something to think about, and to bring up another point, when you were here you made the statement to me that it might work out that you would either give up or sell out your business there, or words to that effect, and go into the handling of other items as a salesmanager on a more or less national basis, such as knobs, accessories and possibly other items. In the event you should make any such move it would, of course, affect me considerably. The point I am making is that if you have any such move in mind I will appreciate your giving me an outline of what you would want for the business, including all rights for the trade name of course."

The Court: What is the date of that letter?

Mr. Snow: September 20, 1944, your Honor. I offer Plaintiff's Exhibit 18 in evidence.

The Court: It will be admitted, subject to objection.

(Plaintiff's Exhibit Number 18 for identification received in evidence.)

(Testimony of George N. Hughes.)

PLAINTIFF'S EXHIBIT NO. 18

[Letterhead] International Electric Fence Co.

Vancouver, Washington

September 20, 1944.

Mr. R. H. Turk,

International Electric Fence Co.

910 West Van Buren St.

Chicago, Ill.

Dear Mr. Turk:

Yours of the 18th received. In regard to the two entries for income taxes, due to so many things to think of you may have forgotten the circumstances as to the amount of \$421.33 but I believe you will have no difficulty in remembering the incident after your memory has been refreshed in regard thereto. This amount was talked of and agreed to between us when you were here. It represents the amount of income taxes for 1943, (one-half of the last $\frac{1}{2}$ amount, for the year, which was still unpaid, being paid quarterly, the full year's taxes being just four times that amount. There was unpaid at that time the last two quarters, amounting to \$421.33, or a total of \$842.66, which sum was still to be paid and which necessarily had to be deducted in the book-keeping entries in order to arrive at the net worth of the corporation. It was in order for you to stand your half, which you very willingly agreed to do, and we settled on that basis.

However we overlooked the fact that the first half of the income tax for 1944, up to July 1st, should

(Testimony of George N. Hughes.)

have been figured in the same way. The accounting firm therefore made up the income tax for the first half of 1944, copy of which we mailed you, resulting in the further charge of \$289.13 which we indorsed on the back of your note as a payment made thereon, since the corporation will have it to pay next March 15th. The corporation, by the way, on the advice of my attorney, will not be discontinued. We will operate on exactly the same basis as we have done in the past.

Regarding the note, if you will recall, this was all made up and executed by the officers of the company, meaning the two of us, while you were here. It draws five per cent interest and is payable as provided in the note and the escrow agreement, and dated July 1st. Turning the note over to you or any third person makes it negotiable and a direct notes payable when due, regardless of any comeback on the corporation by the income tax department. As you will realize, in the event the internal revenue department refuses to allow the salaries we credited to ourselves it is quite possible this whole sum of your note, and of mine also, may have to be thrown back into the profit and loss account of the corporation, causing the said corporation to possibly not only pay all of this amount but more, since both of us had previously drawn considerable sums on such salaries. If such should be the case the corporation stands to lose any sum we may have to pay on your account over and above the amount of the note in question.

(Testimony of George N. Hughes.)

I am sure you will agree, after consideration, that it would be impossible to place the note where it could not be readily withdrawn in any such event as is outlined in the foregoing. We talked this all over and agreed as is outlined in the escrow agreement. I am sure you will agree I am correct in these statements.

Just to have something to think about, and to bring up another point, when you were here you made the statement to me that it might work out that you would either give up or sell out your business there, or words to that effect, and go into the handling of other items as a salesman on a more or less national basis, such as knobs, accessories and possibly other items. In the event you should make any such move it would, of course, affect me considerably. The point I am making is that if you have any such move in mind I will appreciate your giving me an outline of what you would want for the business, including all rights for the trade name of course.

It probably would not be worth to me anywhere near what you would consider it worth to you, but anyway there would be a basis for consideration and negotiating. About the only way I can imagine I could handle it right now would be to get some one like Bert Miller to work there and make up units for us as we need them. (However this is all speculative, I have never mentioned the idea to Bert. I do not know that he would be interested.) I have been unable to see my way clear to give up

(Testimony of George N. Hughes.)

the jobber business entirely and because of this it is necessary that I obtain fencers on the same approximate basis as before the war, otherwise they will take on other lines and both of us are out to a very considerable degree.

In the event you wished to sell I probably could get some one to make up the units there at a price which at least would not exceed the pre-war prices. To my way of thinking, after all these months, I can see no other way than proceeding along the lines mentioned in my several letters to you over the past few months, if I am ever to make any progress in this business. Otherwise the peak was passed last year and from now on it would be declining in volume all the time, down to a minimum, just like an old man "petering out." Will be glad to have any suggestions, or your re-action to these matters.

In this connection also, we seem to be having more call for the cheap battery units than I had anticipated. We have a lot of the #400's and #500's on hand but if you wish to ship us some of the #350 and the #10, as we call them, at the old Pre-War prices we could use a dozen of each of them. Otherwise we might as well just work off some of the #400's.

Please let us know whether or not you will ship them, and when.

Sincerely yours,

/s/ G. N. HUGHES.

Admitted Jan. 13, 1949.

(Testimony of George N. Hughes.)

Mr. Snow: In view of the stipulation, your Honor, it kind of threw me off guard. I had them all ready and most of them I can eliminate and I am trying to do that as quickly as I can.

Will the Reporter (Clerk) please mark this, a photostat of a letter dated November 18, 1944, written on the International Electric Fence Company of Vancouver stationery and signed by G. N. Hughes, as Plaintiff's Exhibit Number——

The Clerk: Number 19 marked for identification.

(Document referred to marked Plaintiff's Exhibit Number 19 for identification.)

Mr. Snow: ——19 for identification.

Q. (By Mr. Snow): I hand you this paper, Mr. Hughes, and ask you if you can identify that as a photostat of a letter you wrote on that date and to the party addressed?

A. Yes, that seems to be a copy of the letter I have written. [161]

Mr. Snow: What was the answer, Mr. Reporter?

(Whereupon, material appearing on lines 24 and 25, page 161, read by Reporter.)

Q. (By Mr. Snow): I call your attention to the fact, Mr. Hughes, that the second paragraph on page two of this letter, dated November 18, 1944——

The Court: Have you offered it in evidence?

Mr. Snow: Not yet. I had it identified, your Honor.

(Testimony of George N. Hughes.)

The Court: I think you should before you read contents.

Mr. Snow: Are there any objections?

The Court: Except your same objection?

Mr. Boldt: That is right.

The Court: It will be admitted.

(Plaintiff's Exhibit Number 19 for identification received in evidence.)

PLAINTIFF'S EXHIBIT NO. 19

[Letterhead] International Electric Fence Co.

Vancouver, Washington

November 18, 1944.

Mr. C. J. Van Andel & Sons,

Van's Hardware Co.

Lynden, Washington

Gentlemen:

Our Mr. Snyder has reported to us upon his return from his trip up your way, among other things mentioning the subject of certain letters and negotiations which have transpired between you and Mr. Turk recently in regard to his price cutting campaign and also his efforts to get you to take over the distributorship of his International fencers for Oregon and Washington. Mr. Snyder suggested we write you something of the facts in the case, especially as to the background of the disagreement between the writer and Mr. Turk. In order to clarify the situation for you we are glad to do this, altho we do not believe in parading the proverbial "dirty linen."

(Testimony of George N. Hughes.)

- We will have to assume Mr. Turk has written you along the same lines and peddled the same bunk to you that he has to others, since we have no copy of his letter. (Mr. Snyder, by the way, was under the impression you would mail his letter to us upon it's return from California.) He has written plenty of untrue statements to others so we will advise you as we have these others.

In the first place the writer purchased and paid cash to Turk for his interests in this corporation, and at his own price. Being a duly organized and registered corporation we have the right to purchase and sell, or manufacture and sell if we wish, any ordinary lawful merchandise, including electric fence controllers. These rights are partially what I paid for when I bought him out. Turk contends that I agreed to buy my fencers from him exclusively but we have his letter in which he admits this was not originally agreed upon but that I must do that now, and at a considerably higher price than heretofore. I have always argued with him that he could not charge me more, under the OPA, and they advise me that is correct. Since this trouble started I have recently mailed him orders for merchandise with the advice that he could charge me either the old price or the new price of 50% of list which he has been holding out for. However he refused to ship at either price, so I am not refusing to buy from him nor to pay his price, altho I did not agree to purchase any given

(Testimony of George N. Hughes.)

amount or any particular quantity of fencers from him originally.

It so happens that I have pulled his financial chestnuts out of the fire for him two or three times and thus saved him from being swamped, no doubt. One of these times was last spring when we allowed him to continue shipping us fencers when we had more than we required for the year's business. We did this so he could have the additional cash to pay off his obligations in the east, otherwise he would have been sunk. This has left us with over 3,000 units on hand as of the time of my buying out his stock in this company. Consequently we have had no occasion to buy very much from him since that time, which leaves him with not much cash coming in. That is really what is upsetting him, additional obligations and not much income from business. Just before Turk and I decided to split up he and his partner in Chicago also had disagreed and divided up their two businesses, Turk taking over the Chicago business and Mr. Soper the Minneapolis business. Mr. Turk apparently has very little that is worth while, at least not much business, while Mr. Soper really manufactures and has a good business. Mr. Turk assembles parts which he buys from others. When his credit is gone he is up against it, like the rest of us under like circumstances.

Turk also makes the statement that I agreed to dis-incorporate, and holds that up against me. That

(Testimony of George N. Hughes.)

is nonsensical on the face of it. We had discussed the advisability of dis-incorporating, there being arguments on both sides, before I purchased his interests but after that time it was no concern of his under what name or plan we operated, unless he wanted us to dis-incorporate so he could prevent us from using the International trade name. That is all he has, the trade name. There is no company, in Chicago, it is simply his trade name.

He has also made the statement that I owe him \$7,000 which I refuse to pay. That also is ridiculous. We could use the short and ugly word but we will merely say there is no truth in any such statement. I will give you the facts so you can judge for yourself: In order to save some of the high corporation income taxes Turk and I credited ourselves with rather high salaries and drew quite a considerable portion of such credits from our accounts. It was always understood that the government might not allow such high salaries, especially in his case since he was not working in this office but was working in the Chicago office, from where he should and no doubt did draw a good salary. Anyway when we settled up, or just before doing so and while he was still one of the company, we decided it would be best to have the corporation acknowledge it's indebtedness to each of us by issuing notes to us as individuals. It was also decided that since the government had five years in which to come back on us for whatever amount they could,

(Testimony of George N. Hughes.)

if any, of such salary we would make the notes run for five years and in the event Turk should be deprived of part of his salary, and the company have to refigure it's income tax statement, thus paying more taxes, this additional amount paid would be applied against his account. It might take all of it, and if more than that the company would be the goat.

We accordingly drew up the notes as agreed, Turks note amounting to \$6448.00 from which \$289.00 was deducted for this year's tax, leaving a net of \$6150.00 approximately. These notes were duly signed and corporate seal impressed on them. And whom do you suppose signed them? None other than R. H. Turk, as President, and G. N. Hughes, as Secretary of the corporation. That hardly looks like we owe him \$7,000 which is due and payable. It was also agreed that his note should be held in escrow at the bank for the five years, or until such time as it should be determined how much, if any, of the amount should be deducted for additional income taxes. Since that time he has demanded that I turn the note over to him in order that he might use it as colatteral at his loan company. You realize, of course, and so does he, that the minute it got into a third parties hands we would be stuck for it, regardless of taxes.

Turk has spread all manner of untruths about the situation and has called me about all the names in the dictionary and in his rage, because he can-

(Testimony of George N. Hughes.)

not have his own way, he has resorted to this price cutting campaign in order to injure this company, and me personally. He has repeatedly said he would make it cost me \$25,000 if he had to go broke doing it. If you would like a reference as to veracity of Turk and myself I will gladly refer you to the National Bank of Commerce or the Clark County National Bank, both of Vancouver, Washington. He has almost always been in hot water financially, and has several suits pending against him, or on file here, so I am advised. I also know of some such suits. As one banker, also an attorney said, "it is too bad you ever got tied up with a man of that kind." I dislike very much having to write such a letter, but because of his trying to get you into it it seems better to state the plain facts. I will still be handling the International fencers from the real manufacturer, not thru Turk who merely assembled parts. It probably would cause us to lose a little business if you went into it in competition with us but certainly you would be stepping into very little profits, if any, but a lot of grief with him. This is all said with all kind feeling toward you. We appreciate your business in the past and trust it will continue and increase as time passes. We will do all we can to assist in every way possible.

If you care to do so we will appreciate your mailing us Turk's letter, or letters, in order that we may know what kind of propaganda he is put-

(Testimony of George N. Hughes.)

ting out, also so that we may be able to answer any other points he may have brought up in his correspondence with you. While we do not like going into personal matters to such an extent we have nothing to hide and since you are being drawn into it in a way we will cooperate with you in straightening the matter out. We will also be glad to cooperate with you in keeping our correspondence confidential. May we hear from you soon?

Yours very truly,

INTERNATIONAL ELECTRIC
FENCE CO.,

/s/ G. N. HUGHES.

I certify that this is true copy of a letter from G. N. Hughes to Mr. C. J. Van Andel & Sons.

Subscribed and sworn before me on this day, February 7th, 1945.

[Seal] VIRGINIA BURR,

Notary,

809 W. Van Buren

Admitted Jan. 13, 1949.

Mr. Snow: I am sorry, your Honor; I am getting a little bit woozy.

The Court: We will quit very soon.

Q. (By Mr. Snow): I call your attention to the second paragraph on page two, addressed to Mr. C. J. Van Andel and Sons, Lynden, Washington, wherein you state: "Turk also makes the state-

(Testimony of George N. Hughes.)

ment [162] that I agreed to dis-incorporate, and holds that up against me. That is nonsensical on the face of it. We had discussed the advisability of dis-incorporating, there being argument on both sides, before I purchased his interests but after that time it was no concern of his under what name or plan we operated, unless he wanted us to dis-incorporate so he could prevent us from using the International trade name. That is all he has, the trade name."

Did you make that statement, Mr. Hughes?

A. I apparently did. It is in the letter.

The Court: I don't want to encumber the record with too many—I don't know how extensive the correspondence was between these people. You might have one hundred letters. There is no purpose in burdening the record unless there is a contrary attitude or theory from the Plaintiff by the Defendant. I don't know how many more you have.

Mr. Snow: I have only one or two more, your Honor, but as I explained to you before, I had thought that I would have to put them all in evidence in order, but since we went through that stipulation this morning I have been able to eliminate an awful lot of them and it is a question now of which ones I want.

The Court: You look them over between now and tomorrow [163] morning, and we will adjourn now until ten o'clock tomorrow morning.

Mr. Snow: Thank you very much.

(Testimony of George N. Hughes.)

(Whereupon, at 5:00 o'clock p.m., January 13, 1949, a recess was had until 10:00 o'clock a.m., January 14, 1949.)

(Counsel heretofore noted being present, the following proceeding were had.)

The Court: You may proceed now.

Further Cross-Examination

By Mr. Snow:

Q. Mr. Hughes, you testified yesterday that you had sent to Mr. Turk—after the corporation had become your property in accordance with that sale that you had sent to Mr. Turk—three or four or five letters—I didn't hear you—I wonder if you would tell me again—protesting the use by Mr. Turk of the name "International" in the International Electric Fence Company.

Mr. Boldt: You misunderstood. A. No.

Mr. Snow: That was my impression.

The Court: I have no recollection of that.

Q. (By Mr. Snow): Did you ever protest Mr. Turk's use of the name "International" for International Electric Fence Company? A. No.

Q. Did you ever. A. No.

Mr. Boldt: We don't now. I want to make it plain that we don't now, if there is any question about it.

The Witness: We never have.

Mr. Snow: All right.

The Court: Let me get this clear now. Mr. Boldt, your position is that you do not object—

(Testimony of George N. Hughes.)

Mr. Boldt: To Turk's use of the name. No; we never have.

Mr. Snow: Using the name——

Mr. Boldt: All we have ever contended, or all Mr. Hughes has ever contended, is that he has a right to use it in the Western States. All we claim is the concurrent right to use it in the Western States. Is that correct, Mr. Hughes?

The Witness: That is correct; absolutely.

The Court: You mean both are entitled to the use of the trade name?

Mr. Boldt: That is right.

The Court: Excepting that the Defendant recognizes and acknowledges the limited use insofar as territory?

Mr. Boldt: That is right.

Mr. Snow: What is that territory, Mr. Boldt?

Mr. Boldt: The Western States.

Mr. Snow: Well——

Mr. Boldt: The States we have filed in.

The Witness: West of the Rocky Mountains is the general understanding.

Mr. Snow: You have a registration in Texas. Is that a Western State?

Mr. Boldt: Well, I told Mr. Hughes this morning that neither the Court nor counsel understand that.

Mr. Snow: He can clarify that?

Mr. Boldt: Yes.

Q. (By Mr. Snow): When you use the words

(Testimony of George N. Hughes.)

“trade name,” do you mean the words “International Electric Fence Company” or the word “International”?

Mr. Boldt: The words “International Electric Fence Company, Inc.” and the use of the word “International” on fencers and allied products in the Western States.

Mr. Snow: That is fine. That is what I am trying to overcome. I had the impression that was a fact. I am offering proof. At the proper time I will make the argument that these are not facts.

Mr. Boldt: The reason I have interjected here is that it was obvious that I had not conveyed to you our position in the matter. [166]

The Court: That puts a different complexion on the case as far as the Court is concerned because I have been approaching the whole problem with the thought that it was exclusive use of the name.

Mr. Boldt: That is the explanation of these letters. Mr. Hughes never claimed that. All he claimed is the right to use it in the Western States.

The Court: And not exclusively.

Mr. Boldt: And not exclusively so far as he and Mr. Turk are concerned.

Mr. Snow: That is contrary to what has come forth. He has filed an application for the registration of the trade mark “International” in the United States Patent Office in which he made an oath that he is the sole and exclusive user and has

(Testimony of George N. Hughes.)

the sole and exclusive right throughout the entire United States.

The Court: Irrespective of that, if he wants to try to work upon a more limited sphere, he may do so.

Mr. Boldt: In all fairness now, Counsel, these papers that you refer to are filed by the Hill firm in Chicago and this gentleman knows nothing about the intricacies of trade mark registration.

Mr. Snow: May we apply that to the books of record and articles of incorporation?

The Court: We won't argue the matter further, but [167] I want to get clear the issue we have before us, and as I understand it is now that the Defendant claims the right to the joint use of the trade name "International" in the Western States only?

Mr. Boldt: That is right, your Honor.

The Witness: That is all we claim.

The Court: Then we can direct our testimony to that issue and, of course, it is stipulated here that in the organization of the corporation, the Washington State corporation, or I presume it could be stipulated, that there was no mention made of an assignment or a transfer of any of the right in the trade name to the corporation.

Mr. Boldt: Oh, yes. It is our contention that the written documents which were signed and subscribed to by Mr. Turk and Mr. Hughes in which all assets including good will and so on——

(Testimony of George N. Hughes.)

The Court: Of course, we have to qualify those because the proof is undisputed that there never was a copartnership.

Mr. Boldt: It isn't undisputed. It is a matter to be explained.

The Court: So far this evidence doesn't support that it was a copartnership, although there was reference to it.

Mr. Boldt: It is very well explained right here in a written document.

The Court: Well, that isn't before the Court. You may proceed.

Mr. Boldt: You can take a look at it if you are in doubt.

Mr. Snow: It is the Plaintiff's contention, your Honor, that Mr. Hughes has no right to use the name "International" anywhere in the United States.

The Court: I appreciate that.

Mr. Snow: And then, your Honor, if we may make a further statement, in order to explain why I am doing what I am doing, so that your Honor will be clear, the witness has made definite statements on direct examination which are contrary to facts and the only way I can show that the man is not aware—apparently not aware—of the real facts in the case is why I am introducing these letters to overcome the presumptions he has raised due to his testimony on direct.

Q. (By Mr. Snow): Mr. Hughes, you testified

(Testimony of George N. Hughes.)

the latter part of the afternoon yesterday to the effect that you did not offer to pay Mr. Turk a premium when he sold his interest to you in the Washington corporation on July 1, 1944. Would you please tell the Court how much Mr. Turk was charging the Washington corporation before July 1st while he was in [169] Chicago for, let's say, the number 106 model?

A. Well, he was charging \$7.50, the early part of the year, and then later, I believe he—we bought none after that because we were heavily overstocked. That is all we paid.

Q. \$7.50? A. \$7.50.

Q. Do you know what Mr. Turk was charging Mr. Wyat and Mr. Clint in Idaho and California for those same units, Mr. Hughes?

A. I don't know.

Q. Didn't you handle the books for the Washington corporation, Mr. Hughes?

A. Yes, sir; part of the time. I had a book-keeper.

Q. But you know the transactions that took place in that corporation, do you not?

A. Yes, sir; that is right.

Q. You said you don't know what Wyat and Clint were paying and yet you made the statement yesterday that your profit on the transaction while the corporation was in existence was \$2.50 on merchandise purchased by Mr. Clint and Wyat, and I am positive that you said they paid \$10.00.

(Testimony of George N. Hughes.)

A. May I say, I assume from your question this morning, did I have absolute definite knowledge of what Mr. Turk was charging them from Chicago? I know what we paid [170] them and I know from information what he charged them, but it is hearsay.

Q. You knew, Mr. Hughes, that they were paying ten dollars for that 106 unit during that period?

A. That is what they paid us, but whether they paid him that from Chicago, I don't know definitely.

Q. And you testified you were paying \$7.50?

A. That is right.

Q. And when Mr. Turk closed this deal with you, didn't he say you would be on the same deal with Wyat and Clint after that period?

A. When we made our agreement there on our settlement, it was definitely understood that we were on our own independent basis and he did say he would have to charge me the same as he was charging Wyat and Clint.

Q. Wasn't that——

Mr. Boldt: Let him finish.

A. (Continuing): But that was no agreement that I had to continue to do that, or that I could buy them later for more or less; merely that he was going to charge me that price. He was charging me ten dollars and, as an independent corporation or business out here, naturally it was up to us. If we couldn't buy it, we didn't; and if we could, we did. According to supply and demand.

(Testimony of George N. Hughes.)

Q. Didn't that amount to approximately thirty-three [171] and one-third per cent more than you had been paying before Mr. Turk sold his stock to you?

A. That is right. It would have if we had bought any. Of course, we didn't buy any for a long while of that number.

The Court: Let me interject a question here, Mr. Hughes. During the time that the corporation was active in Vancouver and both you and Turk were giving your time to it, and sales were being made to people in other territories, California and Idaho, and assuming they were made on the basis of ten dollars a unit, did those sales go into the corporation records and accounts?

The Witness: Yes; they did.

The Court: And the profits that were taken or realized from such sales, were they all profits to the corporation?

The Witness: They were. Expenses, of course, in any business, naturally. They all went into the books of the corporation.

The Court: And then did you, as owner of your stock in the corporation, get half of those profits?

The Witness: That is right.

Mr. Boldt: The book is here, your Honor.

Mr. Snow: Your Honor is apparently attempting to get an understanding of the testimony he gave yesterday and [172] I don't like to go over it but that is contrary to what he testified to yesterday.

(Testimony of George N. Hughes.)

Mr. Boldt: That is not correct, your Honor. It is not contrary. It is exactly identical with what he testified to yesterday.

The Court: I don't care for an argument, Mr. Boldt. I understood him to say yesterday that Mr. Turk, when he went out on the road, got an additional allowance.

The Witness: In these other states, he did; yes.

The Court: Outside of Washington and Oregon?

The Witness: Yes, sir, but that was merely an expense and charged against the expense and commission account and all the rest went into the corporation account owned by each of us.

The Court: In Washington and Oregon?

The Witness: There was no division like that.

The Court: Now I wish, for the benefit of the Court and counsel, just what was your arrangement as distinguished between Washington and Oregon and the rest of the States now, from the period of time when the corporation came into being until you bought it out?

Mr. Boldt: If it would be helpful, you might illustrate it from the book.

The Court: I want him to answer it if he can.

The Witness: Well, I don't quite understand the question.

The Court: Well, let me ask you. Was there a distinction made in the profits from sales outside Washington and Oregon and those made in Washington and Oregon?

(Testimony of George N. Hughes.)

The Witness: No distinction between the net profit. None at all. We merely paid Mr. Turk a commission of twenty per cent in the States outside Washington and Oregon.

The Court: Then there would be a difference in the net profit?

The Witness: I mean the total income. It was all income from all the states. Naturally we didn't make as much in some states as others.

The Court: What other states besides Washington and Oregon did you have that arrangement in?

The Witness: Well, just Washington and Oregon. I personally would benefit only fifty per cent of the profit, but on the other states, outside of that, I would benefit from the net profit after we had paid Mr. Turk twenty per cent commission.

The Court: You would get forty per cent and he would get sixty?

The Witness: No; each got fifty per cent. [174]

The Court: On states outside Washington and Oregon?

The Witness: No. Fifty per cent of the net profit of the corporation in all of the states.

The Court: You were making a distinction between net profits. Net profits—on Washington and Oregon sales, the net was between the two of you; but in Idaho sales your net profits were eighty per cent?

The Witness: It was less, of course, but it was divided equally.

(Testimony of George N. Hughes.)

Mr. Boldt: He is approaching it from a book point of view and that is why I thought if he looks at the books——.

The Witness: All of the entries, in Oregon and Idaho and California, there is no difference in our book entries. Mr. Clint and Mr. Wyat——

The Court: I understand that, but when a sale was made in Idaho, you made allowance to Mr. Turk of twenty per cent?

The Witness: Twenty per cent of the sale price.

The Court: And so your gross then was eighty per cent of the sale price?

The Witness: That is right.

The Court: And then that was divided equally?

The Witness: That is right. [175]

The Court: So that would wind up with a forty-sixty per cent on the gross?

The Witness: I see your point now; that is right.

Q. (By Mr. Snow): In order to clarify that a little more, of the eighty per cent, Mr. Hughes, what was the actual profit of the corporation on that transaction? That was left to divide up in dollars and cents?

A. The net profit is hard to figure.

The Court: I am not very much interested in that feature of it.

Mr. Snow: You see, your Honor, the way it stands now, twenty per cent commission to Mr. Turk on the sales price doesn't seem very much

(Testimony of George N. Hughes.)

but when you take off the cost of the merchandise——

The Court: I am not so much concerned with that unless it might throw some light on the major issue here.

Mr. Snow: It does, your Honor, definitely.

The Court: If he says there was no net profit, and you want to ask him that question, why, he may answer that. No net profit to the corporation.

Q. (By Mr. Snow): Will you answer that question, Mr. Hughes, please?

A. Yes; there would be a net profit.

Q. How much? [176]

A. That would depend.

The Court: Take one item.

Q. (By Mr. Snow): Take the 106.

A. That is what I am coming to. I am not absolutely positive but my recollection is that we paid six-fifty for the 106. I think that is correct. That is in 1941 then later the price was raised to \$7.00 and sometime during 1944, or '3, then we were paying \$7.50. The price was raised, so that we made more when we originally started in on the 106's than we did later.

Q. Do you have any recollection of what that was, Mr. Clint—Mr. Hughes; what that figure was?

A. As to what?

Q. As to the amount the corporation received?

A. From Clint and Wyatt?

Q. That is what we are talking about.

(Testimony of George N. Hughes.)

A. We charged them ten dollars each.

Q. I know, but what was the net figure to the corporation?

A. We paid Mr. Turk twenty per cent commission.

Q. That would be two dollars.

A. That would be two dollars, yes, and then what they cost us, ..6.50 or 7.00, whatever it was—it varied—it would be different. That would run either three-fifty or [177] \$3.00 to be divided between us.

Q. Wasn't the figure fifty cents?

Mr. Bolt: That isn't from the figures used.

A. That wasn't the basis.

Q. It still comes out fifty cents.

Mr. Snow: Will the reporter (clerk) please mark this letter, which is dated March 13, 1944, signed by G. N. Hughes, International Electric Fence Company, and addressed to North Coast Mercantile Company, as Plaintiff's Exhibit——

The Clerk: Plaintiff's Exhibit 20 marked for identification.

(Document referred to marked Plaintiff's Exhibit Number 20 for identification).

Q. (By Mr. Snow): I hand you, Mr. Hughes, Plaintiff's Exhibit Number 20 for identification and ask you if you can identify that letter?

A. Yes; that is my letter.

Q. That is your signature on the end?

A. That is right. I signed it.

(Testimony of George N. Hughes.)

Mr. Lyon: What was the date?

Mr. Snow: March 13, 1944. I offer this in evidence.

Mr. Boldt: No objection, but may I look at it a [178] moment?

The Court: It will be admitted in evidence.

(Plaintiff's Exhibit Number 20 for identification received in evidence.)

PLAINTIFF'S EXHIBIT No. 20

March 13th, 1944.

North Coast Merchantile Co.

Wholesale Grocers,

Eureka, California.

Gentlemen:

Your letter of the 10th regarding handling the International electric fence controllers through us instead of the Charles Klint Company of Fresno is just this morning received. We wish to express our appreciation of your consideration, also for the order included in your letter.

As indicated in our letter to you of Feb. 10th, this Washington company is limited to handling the International line in the states of Washington and Oregon, although we otherwise would be very glad indeed to serve your needs. In order to do this, however, we would have to obtain the permission of the main office in Chicago. We are therefore mailing your letter to them with a request that

(Testimony of George N. Hughes.)

they either write you direct on this subject or authorize us to make shipment to you direct from this point. You no doubt will hear from them within a very few days.

Again thanking you for the order for fencers and with the hope you may soon be able to obtain the merchandise required, we are,

Yours very truly,

INTERNATIONAL ELECTRIC
FENCE CO.,

By /s/ G. N. HUGHES,

G. N. Hughes, Mgr.

Mr. Turk:

I forwarded their original letter and order to Klint on Feb 10th. They very evidently do not wish to buy through him. I do not know what price you are giving Klint nor what price he has asked from the North Coast Merc Co. Anyway they apparently failed to agree, so it seems to be up to you to handle it so as to hold a customer, and not offend them. Please advise what is done so we will be informed in the event they write us again.

G. N. H.

Admitted Jan. 14, 1949.

The Court: Now I wish you would read the sentence or paragraph in the letter that you feel is applicable here.

Mr. Snow: May I inject a question first, your Honor?

(Testimony of George N. Hughes.)

The Court: Very well.

Q. (By Mr. Snow): Mr. Hughes, didn't you testify yesterday that the Washington corporation had the right to sell anywhere in the Western states during the period of incorporation?

A. Yes.

Q. I call your attention then to the third sentence in this letter, Plaintiff's Exhibit 20, which was written March 13, 1944, before the sale of stock——

Mr. Boldt: And after the time that the altercation arose.

The Court: I have that in mind. Mr. Turk was in Chicago at that time.

Mr. Boldt: That is right.

Q. (By Mr. Snow, continuing): "As indicated in our letter to you of [179] February 10th, this Washington company is limited to handling the International line in the states of Washington and Oregon, although we otherwise would be very glad indeed to serve your needs. In order to do this, however, we would have to obtain the permission of the main office in Chicago."

Did you make that statement in this letter, Mr. Hughes ?

A. That is my statement. However, there is an explanation for that.

The Court: You may give it.

Q. (By Mr. Snow): What is the explanation?

A. The reason for that letter was just prior to that time, Mr. Turk, a few months being in Chicago,

(Testimony of George N. Hughes.)

he was the president of our corporation here and half owner of the corporation and had complete control of our supply of merchandise and naturally it was necessary that I get along with him the best way I could and he had previously requested that any business outside Washington and Oregon that we divert to the main office in Chicago, giving us the assurance, in various letters, that any business outside of that the corporation would be reimbursed for whatever profit we were entitled to. So, just as a matter of passing the thing along and giving the reason why we did not fill the [180] order we sent it to Chicago in accordance with that understanding.

Mr. Snow: Now, will the Reporter (Clerk) please mark a letter written on the International Electric Fence Company letterhead, dated September 2, 1943, signed "George" for Plaintiff's identification——

The Clerk: Plaintiff's Exhibit 21 marked for identification.

(Document referred to marked Plaintiff's Exhibit Number 21 for identification.)

Q. (By Mr. Snow): Mr. Hughes, I hand you Plaintiff's Exhibit 21 for identification and ask you if you can identify that letter? A. Yes.

Q. Is the George, the word "George" at the bottom of that letter your abbreviated signature?

A. Yes; that is right.

Q. Does not this letter contain this sentence?

The Court: Are you offering it?

(Testimony of George N. Hughes.)

Mr. Snow: I am sorry. I offer this letter in evidence.

Mr. Boldt: No objection.

The Court: It will be admitted in evidence. Better have the Clerk mark it admitted, Mr. Snow.

(Plaintiff's Exhibit Number 21 for identification received in evidence.)

PLAINTIFF'S EXHIBIT No. 21

[Letterhead] International Electric Fence Co.

Vancouver, Washington,

September 2d, 1943.

Dear Mr Turk:

Your letter of the 28th received inclosing letter from Charles Klint Co. He wrote us the same day, as you will note by the incloseures. My reply is also attached, which explains the matter fully as far as we are concerned. He surely is putting on the baby act for some reason. There is nothing inconsistent, incorrect or mysterious about our statements, if he would follow them through and check with his actual receipts. He would have a hard time convincing me that he does not know what these invoices are for. He is merely stalling for time and is putting on this act so you will have to reply to letters before he is compelled to pay. His check for neither the \$240 or the smaller amount have arrived so far. This \$240 invoice has nothing to do with the lost units. They were shipped at a much later date, as he will knows. You may not agree

(Testimony of George N. Hughes.)

with me but you asked for comments on Klints letter so I am giving them to you. I imagine you have rather felt all the time that I have not been particularly sold on that set-up. It has always been my feeling that there is something mental, financial or otherwise not just what it should be with this firm.

My personal opinion is that for the long pull, all things considered, you would be just as well off and save yourself many headaches and uncertainties if you would place the California territory in our district to be supplied from here as we used to do, except that it would have to be on a fifty-fifty basis just as is Washington and Oregon, making it a part of our territory to oversee. Your profit would be half the firms profit anyway and the difference to you would be very small. You can see that we would lose money to pay a 20% commission on a #106 at \$10.00, Klints price, and pay the freight both ways. I am willing to see to the work for my share of the profits and with the additional business we could afford to be on the road more in all directions, which would add more business. In the event you wished to consider it, or make such a change, you could simply tell Klint he would be supplied from here at the regular jobbers price and he would be on the same basis as all the others. Then by advertising in the farm papers we would pick up a lot of direct business, retail and dealers, the same as we do in Oregon and Washington. It

(Testimony of George N. Hughes.)

is apparent to me that responsible jobbers are not pleased with the set-up of having to buy from their competitor, and especially from one who is not too favorably known financially. I feel sure we could sell them considerably more controllers from here than Klint will ever sell them, when the controllers are available. They would at least feel that they were getting a square deal from headquarters for the western territory. (Anyway these are thoughts for you to digest. A frank discussion is always advisable in considering any business situation).

I am inclosing the California orders as asked for by you. I am not clear as to just what the point is, as you had just mailed the Bay Cities order back to us, but here they are for you to do with as you like. Please let me know what, if anything, I am to do about them, except to notify them I have turned them over to you for attention.

I notice in this morning's mail an invoice for the delayed choppers, which pleases us a lot.

There are a few things which are giving us a lot of trouble lately, probably due to inexperienced help, but possibly to carelessness which could be corrected. I am calling this to your attention for the reason that I assume you are busy in the office and some of your help may be slipping something over on you. I know you would not approve of what we are receiving here.

Out of 78 units opened up yesterday for testing there were 14 of them defective, inoperative for

(Testimony of George N. Hughes.)

one reason or another, in addition to several with defective choppers.

The last few shipments are so bad we dare not ship out to any jobber without testing out every machine. They have been coming back to us in flocks for repair. Entirely too much transformer trouble, among other troubles.

One serious trouble is that your riveters are putting out units with only two and three rivets holding them to the case. The result is that several were loose in the box on arrival, some with wires pulled out of the transformer, 2 I believe, in the above lot. We still have 11 cases to open. Hope they are better. Many of the light bulbs, green and red, arrive inoperative. We also have the former shipment without choppers to open up when the choppers arrive.

I notice some of the rivet heads, quite a few in fact, come off of the rivet, letting the transformer drop loose in the case. However there are still a number of them come through without more than either two or three rivets ever having been placed in them. There are no rivets or washers inside the case and no marks on the paint showing a rivet had ever been inserted.

In order to have it on our order book I will inclose an order for a few items. We must have transformers for these #106's. Have several laid up for repairs and just one spare transformer in the house. We are saving it for emergency.

(Testimony of George N. Hughes.)

Haven't seen Mrs Turk for some time. I am wondering if she has gone or is expecting to leave for a visit back there with you. Weather here is lovely but on the cool side of the ledger. Have had no hot weather at all this year. It has been the coolest summer I have ever seen anywhere.

How is Mr. Soper coming along? I assume Mrs. Soper is helping him out at that end. My regards to both, if you see them.

Sincerely,

/s/ GEORGE

[Pen Notation]: Klints check just arrived—in full.

Admitted Jan. 14, 1949.

Mr. Snow: I am sorry. I am trying to speed this up as much as possible, your Honor.

Q. (By Mr. Snow): "My personal opinion is that for the long pull, all things considered, you would be just as well off and save yourself many headaches and uncertainties if you would place the California territory in our district to be supplied from here as we used to do, except that it would have to be on a fifty-fifty basis just as is Washington and Oregon, making it a part of our territory to oversee."

Did you make that statement to Mr. Turk on September 2nd, 1943?

A. I wrote that letter, yes.

(Testimony of George N. Hughes.)

Mr. Snow: Will the clerk please mark this document, which is a letter addressed to "Dear Mr. Turk", and signed by "George" and written on International Electric Fence Company letterhead, and dated July 24, 1943, for identification as Plaintiff's Exhibit——

The Clerk: Plaintiff's Exhibit 22 marked for identification.

(Document referred to marked Plaintiff's Exhibit Number 22 for identification.)

Mr. Snow—Exhibit 22

Q. (By Mr. Snow): Mr. Hughes, I hand you Plaintiff's Exhibit Number 22, so marked for identification, and ask you if you can identify that letter? A. Yes.

Q. And is that your signature at the end?

A. Yes.

Q. I call your attention to the fact that after, that prior to July 24, 1943, in this letter of July 24, you made this statement——

The Clerk: It isn't admitted.

Mr. Snow: I am sorry.

Mr. Boldt: No objection.

Mr. Snow: I offer it in evidence as Plaintiff's Exhibit 22.

The Court: It will be admitted.

(Plaintiff's Exhibit Number 22 for identification received in evidence.)

(Testimony of George N. Hughes.)

PLAINTIFF'S EXHIBIT No. 22

[Letterhead] International Electric Fence Co.
Vancouver, Washington
July 24, 1943.

Dear Mr. Turk:

First, I inclose herewith check for \$482.16 to bring your account down to a credit of \$600 even, and my own for the same sum, in order to keep our personal accounts on an equal basis. As we can spare the funds we will remit the balance due, in payments, until the whole amount is paid.

After this I would suggest you send your air mail via Freightways, we might get it under a week in that way. Your letters of the 13th and 16th both arrived together two or three days ago, I forget just which day. Have been too busy to give them much attention. Klint has paid \$296 and \$88.58 during the past week. This leaves him owing only two invoices, \$240 and \$212.50.

I note your remarks about the insulator situation. The quantities will be O.K. if we can get the types mostly in demand.

We will soon be out of anything to ship to jobbers. 5-W in 500's is all we have in any quantity and expect to have orders to clean them up next week.

I certainly hope there will be no trouble about closing the deal with Electric Service Systems. The added quota is badly needed.

(Testimony of George N. Hughes.)

Regarding buying out your share of the business, I hardly know how this would work out. I inclose sheet showing assets and liabilities as of July 1st. They will vary from time to time, of course, depending on how long we have been without units and whether they are paid for or not. Probably could figure on a net w. of \$6,000, on an average. Unless we can get units in quantities there will not be much increase in Net Worth. The overhead will eat it up as fast as it accumulates. If you fall down on deliveries we would have practically nothing in a short time except the truck, tools and other equipment.

I do not see how Wyatt can be making so much money unless he is getting the controllers to sell.

I do not see how I could pay you an increase in price and be able to sell to the jobbers, not being able to raise my price on them. As you know, it is better to keep them in line for after the war business than to shut them off for a little higher price on fewer units. In other words there is more money in volume with a steady flow than to confine yourself or myself, at either end of the line, to selling just to dealers. It is the long pull that counts. The prices you mention would eliminate the jobbing business entirely. How would you expect me to handle that end of it? What would be your idea?

In the event I bought out your interests here it would necessarily have to be understood that I have the exclusive rights of sale in Oregon and Wash-

(Testimony of George N. Hughes.)

ington, also that I be assured my proportion of controllers based on the actual demands and needs of my territory in comparison with the requirements of the territories of others. Otherwise I would be left out in the cold.

Referring again to the price consideration, it would appear that in order to take care of changes in prices in the future, either higher or lower, the price to us should be a certain percentage of the established retail list price, just as we have it now. With our price 35 to 40 per cent of the retail price we then could hold our jobbers and keep the set up we have maintained all this time.

If you have any other system in mind which would work let's have it. Also let me know on what basis or for what total amount you would sell. If I think I can handle it I will then see what I can do about it.

Sincerely yours,

/s/ GEORGE

Admitted.

Q. (By Mr. Snow): "In the event——." I am quoting, "In the event I bought out your interests here it would necessarily have to be understood that the exclusive right to sales in Oregon . . ." I have to repeat that. "In the event I bought out your interests here it would necessarily have to be understood that I have the exclusive rights of sale in Oregon and [183] Washington."

(Testimony of George N. Hughes.)

Is that your understanding, was it, when you wrote that letter?

A. That was merely preliminary. That was sometime before we made any arrangement. That was just exploring possibilities.

Q. That was almost a year before transactions took place? A. Yes; that is right.

Mr. Snow: Will the clerk please mark—it is marked, and admitted too. That has been taken care of. I am sorry. That will be all, Mr. Hughes.

Mr. Boldt: If your Honor please, there are a series of letters here bearing on the same subject matter and I have arranged them in chronological order and I would like to attach them together.

The Court: Are they responses to the letters—

Mr. Boldt: That is right, and explanatory on various phases of it, and I will call attention to the particular things after they have been stapled as on.

Mr. Snow: I have no objection.

Mr. Boldt: These are answers and additional letters.

Mr. Snow: Is he going to testify to each letter in there? [184]

The Clerk: Defendant's Exhibit A-8 marked for identification.

(Documents referred to marked Defendant's Exhibit Number A-8 for identification.)

Mr. Boldt: For your convenience—

The Court: I don't want to take the time now to have those letters all read.

(Testimony of George N. Hughes.)

Redirect Examination

By Mr. Boldt:

Q. Look at the signatures then, will you please? The signatures of Mr. Turk is what we are interested in. You can read them some other time, Mr. Turk. Just look at the signatures.

Mr. Snow: We will agree that the signatures on the letters containing signatures are Mr. Turk's signatures, or facsimiles—that is, abbreviated signatures.

The Court: They will be admitted.

(Defendant's Exhibit Number A-8 for identification received in evidence.)

DEFENDANT'S EXHIBIT A-8

[Letterhead] International Electric Fence Co.

Chicago, Illinois

March 25, 1943

Dear Mr. Hughes:

The Assn. went on record yesterday as only wanting 120% of 1940 in 1944. This is 20% less than in 1942. They are desirous of a market anxious to take anything, at any price and to rigidly hold in control all competition. Soper was the only one to vote for 166% as suggested by Prime. Prime incidentally had withdrawn from membership because the assn. would not allow them to have a portion of their allotment. Best of Prime Mfg. yesterday stated that he had secured an allotment for his B manufacturers group but declined to

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

state how much. If such is the case it will strengthen our claim for recognition when I go and ask for an increased allotment.

Specialties Mfg. of Minneapolis yesterday indicated to Soper that he might be willing to part with a portion of their 10,000 unit allotment. Soper and I are going to Minneapolis Saturday to see what can be done in regard to this. If we can pick up 2000 or more units at a not unreasonable price it will be to our advantage to do so. Will try for the whole allotment if it can be had. Practically all of these manufacturers are producing mostly battery units. They admit that they boosted their production figures in setting their base for 1940. Seem to think they were real smart.

I think that you still have a carton of 106 transformers in back of the 400 transformers on the shelf, a reserve supply. If I am wrong let me know.

The truck needed servicing badly at the time I left. I had intended to have it done but like often happens did not think of it when I had time enough to get it done. Needs oil change too. There is no anti-freeze in it because that which was in was no good and I drained it out and continued to do so during the few cold spells we had.

The weather here is nice. This morning was warm, about 45.

I have gotten many nice letters in reply to the many I sent out to our dealers via airmail. The

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

County Agents opinions carry the most weight and these together with the State War Boards are the things most likely to give me a clearance on my appeal. We Have Just Got To Get That Increased Output In Some Manner.

I want to keep close track on how much stock you have on hand and how many orders on hand so that I can send these units where they are most needed.

We will henceforth send both Klints and Wyatts orders direct in order to simplify book-keeping. I am not quite willing to take Klint into my confidence under present conditions but the deal will be the same as with Wyatt whom we can count on for full co-operation. This will restrict our financing to some extent but should cause no difficulty. Somehow we are going to get an increased output. Those tubes we ordered will be available next week in quantity. Will send you about 350, Klint 50 and Wyatt 100. More are to be delivered 60 days later.

Sincerely,

/s/ DICK

[Letterhead] International Electric Fence Co.

Chicago, Illinois

September 9, 1943

Dear Mr. Hughes:

Like you, I have gotten pretty well disgusted with Klint's aversion to meeting the issue squarely and his inability to follow bookkeeping entries correctly.

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

However, to handle California sales one needs to have a man down there to solicit and to have a stock from which shipments can be made. That we will have to discard Klint if he gets any worse, is a certainty. His last check he deducted the 2% despite the fact that the shipment was made two months ago. His excuse was that he just got the shipment.

Do not ship any units or repair parts from Vancouver to California or Idaho points but refer such orders to the distributor or directly here. This is solely to keep things straight and to avoid any friction with Klint or Wyatt.

Let me know how sales are in your section both wholesale and to jobbers and retail also. What the prospects are for moving more units out now and how many units you will need to fill orders inside thirty days. I ask this because I want to know how to apportion these units and also I want to know how soon we will have to figure on storing units for next years sales. I would that we could put out more units now but there are so many bottlenecks that we are lucky to get out as many units as we have. I bought \$1610.55 worth of resistors from overrun stocks of the Ohmite Corp last week. This and other purchases made when we get an opportunity means that our investment in inventory is exceedingly high in spite of our need of ready cash for payments.

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

I also bought one tone of fine copper magnet wire for transformers this week at a cost of slightly over \$1000.00. To get same I had to buy from four different companies. We have over \$5000 worth of choppers ordered at our cost and got our first in a long time yesterday. Will send you some today.

There will be no 41 transformers At All. AD 31 we expect soon. We have some AD 21 on hand. We have no 106 on hand but will have soon. Make bad 41 over into higher than standard amperage AD31 say 12 ma with a 2500 wire wound resistor in series with the terminal output. I have a fair selection of resistors from 25,000 to 60,000 ohms now. Cost is high from Ohmite but I got them and thus enabled us to produce.

Cast costs are up 20% and most other items including labor plus the fact that we are paying plenty just for the privilege of producing under the quota set up. Our difficulty in getting parts is raising the very dickens with our payment schedule and we will need help unless things break more favorably than they have been. It looks like the quotas will be dropped for next season so that the purchase of quota will all have to be apportioned against this years production which will make it a lot more than any \$1.00 per unit.

Do what you can for us and for me personally on this financial set up. It takes money to make

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

the more go and our money here disappears faster than we get hold of it. We have paid \$11,000 on Electric Service Systems so far but are several thousand overdue now tho in no danger as yet because of 60 days leeway provided in our contract. We also have a rest period from October to February with no payments to make.

Regards,

/s/ DICK

[Letterhead] International Electric Fence Co.

Chicago 7, Illinois

April 3, 1944

Dear Mr. Hughes:

Marshall-Wells did not buy a carload of insulators from us because delivery could not be instantaneous. They apparently bought standard 5½ insulators or possible another make of triple grooved knob It is a safe bet that they paid more for them and will charge more for them than we need to. Marshall-Wells bought a small lot of Wisconsin insulators at Spokane.

I have seriously stuck my neck out here by manufacturing way out in excess of our quota but at least we have an adequate stock on hand out there to take care of this seasons needs. It may be that I will be called onto the carpet for infractions of these rules because of more or less jealous competitors. As a matter of fact it is impossible to manufacture at all without breaking some regulations as

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

they are so counfounded contradictory so I pick the ones that I shall go by and trust that the general desire to get as much farm equipment made as possible will be sufficient justification.

I know that I have put you behind the Eight Ball in loading you to the scuppers with stock and that it may look to you like you never will get rid of all of it. However it looks to me like Marshall-Wells are already sore at us. Mr. Newton will not answer my letters or telegrams in regard to insulators. He figures you loaded some of their dealers pretty heavy with our stock. Find out if you can as soon as you can as to when they take on another line, it will then be up to you to get all the business available regardless of Marshall-Wells affiliations. Wyatt is also having trouble with Marshall-Wells in that they have found his territory all worked up into a nice business at prices to dealers \$2.00 higher than they charge, hence they are going right to town at Wyatts expense and Wyatt does not like it. Look out for this trouble on the new 411 and the 500 and if Marshall-Wells buy any see that the sale is made on the basis of your list price and that their discount is but 45% off that list, thus they cannot undercut your price and in that manner lead to more trouble such as Wyatt is having with them.

The next problem is taxes and I do not lean toward your viewpoint that we will not make more

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

than \$10,000 over and above our salaries of \$12,000 each. I also believe that we should have the company pay our withholding tax and let our discount company wait another ten days if necessary rather than to neglect to file on the basis of last years income and salaries. Above all else we wish to avoid the excess profits tax and we also wish to divide the proceeds equitably. Our company here could arbitrarily assess you or rather our company there a higher price but this we are reluctant to do. In the event that we find that we have over estimated our income there we can give you a credit on this overcharge at the end of the year thus bringing the corporation profit up to the \$10,000 permitted before the assessment of the excess profits tax. Will this be agreeable to you? We will, of course, have a definite understanding as to how this is to be handled so that there can be no chance of a slip up or of our putting one over on you. I think that the time to do this is Now. I believe that delay will invalidate the price change from the Dept of Internal Revenues standpoint. Since we figure alike in that the majority of this season stock is already purchased the price will have to apply on all invoices since January 1st.

I have the advice of two very competent tax experts, one in Minneapolis, to help me investigate this problem and you can get some one there if you like to check the legality of this move and its ac-

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

complishments. We want to work this thing together for our mutual satisfaction and well being. I am quite certain that we can use a credit for the overcharge as a balance with which to even up our corporate income at Vancouver. I do not know of any other way to do so without getting away from impartial division of income. Bear in mind that we are agreeable to kicking back to you your share of the increased prices and that undoubtedly you will net several hundred per cent more from this kickback than you could net from your share of that added income in excess of \$10,000 after the government got thru with it. If you have any other plan please state it at once. I am definitely of the opinion that this is going to be a big year because we certainly have plenty of stock on hand and can go all out on sales therefore I am insistent that we take action on this at once regardless of any doubts as to whether it may or may not be a big year.

We are short of funds here also. Income taxes raise the dickens with our cash on hand. Our profits are all invested in Electric Service and in inventory. Prepaid advertising amounting to several thousand dollars. Soper and I have not paid our last years income tax in full and here comes another assessment the 15th. Mind you that we still owe \$12,000 on that \$31,000 purchase of Electric Service and that we will have to borrow to pay

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

it off. I am going to Minneapolis tomorrow to see if we cannot get enough loan to put the ownership definitely in our hands.

Be careful how you put out that advertising in Oregon the 500, 411 and 400 are not Oregon Approved but I am trying to get them approved soon as possible. After the units are submitted there should be no trouble. Am afraid Mr. Volheye would object if he thought we were trying to give him the run around.

Sincerely,

/s/ DICK

[Letterhead] International Electric Fence Co.

Chicago 7, Illinois

April 12, 1944

Dear Mr. Hughes:

Marshall-Wells are handling other controllers than ours and are pushing them at that. How much of this may be do to our having sold some of their dealers I do not know but I am inclined to take the stand that what is past is over with and that we must therefore plan on what we are to do as a result of this move on their part. I suggest that we immediately refuse to sell them any more controllers and that we make a determined drive on their dealers wherever they may be but particularly so in Oregon.

There is no need to inform Marshall Wells that we are refusing their business hereafter until the

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

issue comes up. Similarly there is no need to tell their dealers that we are dissatisfied with Marshall-Wells altho you can if you want to. In other words we have no desire to stir up ill feeling or to give any one the idea that we are sore at any one. I am rather inclined to believe that Mr. Newton is sore at someone because he ordered a carload of insulators from me and was to write to me confirming it. He has not written nor has he answered my wires asking for confirmation.

Marshall Wells are underselling Wyatt by \$2.00 per unit. This has got to stop even tho Wyatt left himself open by putting his dealer price at \$16.00 and thereby left himself wide open for a hamstringing attack by Marshall-Wells. Wyatt worked up the territory and Marshall-Wells make the sales. We can force Wyatt to line up but in view of the fact that Marshall Wells have another line I think we had best take the other action instead.

I believe that it is desirable to hold our list prices to \$26.50 on the #500 and #411. We will still make a satisfactory margin of profit even tho we bill them to you at \$13.25 as we are doing now until we get this tax muddle straightened out. We do not like to take an arbitrary stand and we are not doing so. In the event that some other means is found to handle the excess profits that I feel sure we are going to be subjected to and that we can agree on this method then we can credit you for

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

the overcharge. We start the charge now because you have stated that we cannot make this charge retroactive. I think that we should if it is possible and particularly so if purchases of controllers from now on do not number many. There is no desire on our part to get more than our share of the profits and it is clearly understood that some form of kick back would be arranged for your share. I am greatly interested in your plans for handling the situation and any others in regard to the business.

I have worked out what I believe will be a wonderful method of selling our line of fencers to dealers which will center around the #411. This unit cannot be felt at a 5 milliamper output and with this demonstrated and the reasons for it explained your dealer will be very much sold International fan. Will explain this in detail later. It requires some meters which I am Trying to get. You could use your present meters.

With sincere regards,

/s/ DICK

April 19th, 1944.

Dear Mr. Turk:

I had expected a reply before this in answer to my letter outlining a plan for caring for the excess profits tax, but to date there is no word in reply to that letter. The reason I bring this up is that

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

I am getting out my price lists and I must know just where we stand as to prices . As the attorney here says, our setup here is essentially a co-partnership, since it has always been our practice to divide the profits equally as part of our wages and the corporation is not expected to make much of a profit. The corporation was formed in order to protect each of us in the event of accidents or other mishaps and is not expected to accumulate wealth, or profits. For this reason he thinks (and so do I) that it would be better to handle it in the way mentioned in my former letter, in order to get the profits where it is intended they should go, to us individually instead of the corporation. Raising our cost prices now and later issueing a credit of any kind would be juggling the accounts without any particular benefit, since it would have to be accounted for next year in some way.

For these reasons I believe we should maintain our past schedule of prices as printed on our dealers and jobbers lists, also our costs. I yield on your point regarding the list prices on #500's and #411's and will make it \$26.50 list.

Please let me hear from you at once so that I can get out our lists with a clear understanding as to all prices.

Marshall-Wells have been selling that little round metal case SHOK fence for some time but it is so weak that this competition does not amount to much.

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

Their own dealers admit it is not much good. I thought all the time that they had bought a car of insulators.

We have a notice of shipment for June 1st on our order for knobs. Please see if you can't get this stepped up at least two weeks. We could be immediately and will be out of insulators before this order can possibly reach us.

Is there any possible way to get another voltage testing meter? I need this badly on trips. You know how it is, not being able to show a customer the difference between our fencers and other makes.

Let me know as soon as possible regarding your sales plan centering around #411. I want any help available but fear we cannot push this number and #500 until you get them approved by Wisconsin, so I can get them approved in Oregon. Please advise what you are accomplishing in this regard. This is essential to our Oregon sales of these models.

Sincerely,

[Letterhead] International Electric Fence Co.

Chicago 7, Illinois

April 21, 1944

Mr. G. N. Hughes
2215 Main Street
Vancouver, Washington

Dear Mr. Hughes:

My specialist on corporation taxes states that

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

your plan of reselling units to the corporation will not be feasible regardless of what your attorney may have told you. He states that the sale of these units to stockholders at less than the repurchase price will be held as a dividend and will be part of the corporations profit and hence would still be of no use in holding the excess profits under control.

He states that it is possible to invoice you on one invoice for the errors in invoicing since January 1st, 1944. This would be difference between the invoiced prices and the price other distributors pay or 50% off list. This will involve no falsification of records nor will it involve any difficult book work on the part of either company. In your report for income taxes you merely report on the cost of goods sold, in this case, several thousand dollars more than it would have been, otherwise. We will have to figure out some way to compensate you for your half of this increased price but this should not be too difficult. Your suggestions in this regard will be welcomed.

I will be out West soon, definitely inside 60 days. I want to enthuse you on the #400 and #411 as we are starting to produce them. The #411 will be our heavy seller if you follow my suggestions.

The 1½ megohm resistor we have used successfully for a year or more in the AD 31 is not large enough for service in the #411 we have discovered. We have ordered 3 watt resistors to use instead

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

of the 1 watt and meanwhile we are using 2 and 3 watts up to 2 megs. If you have any 411 units on hand please replace the 1 watt $1\frac{1}{2}$ meg resistors to ground with 2 watt resistor either $1\frac{1}{2}$ or 2 megohm value. We are sending you some today if possible to get them out in time. In case of a bad resistor to ground you will have a short and will think that it is a bad condenser as we had several reports of already only to find that they were all wrong and it was the resistor and NOT the condenser.

The Wisconsin approvals are assured in very short time on all units save the 106. The new #400 will be Far Hotter than heretofore and so will the #500. A 6 ohm resistor in the AC input of the first 500 units is essential as it puts out Too Much Current otherwise. Wisconsin passed it with this resistor added.

I am sending you a 3000 volt meter today. I am also having made up a complete test kit containing AC and DC milliammeters, voltmeter, rheostat and testing hand grips. With these we will demonstrate to the dealer that he cannot even feel currents which heretofore were deemed dangerous and that the entire output of our #411 or AD 31 will not have any freezing tendency. I think that you will not only get the interest of the dealer when you demonstrate but that you will also sell him. I am having a dozen of these complete kits made as fast

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

as the meters become available. They will be sold at cost of parts and assembly. If you can knock over a couple more dealers each day on the road with one of these outfits you will soon pay for one.

Incidentally we got Ten Absolutely New Dealers Today with over \$350 worth of business. We Are Out After Volume And Will Have It Here This Season. We have another 20,000 hardware dealers yet to circularize.

With best regards,
/s/ DICK.

[Letterhead] International Electric Fence Co.

Chicago 7, Illinois
April 24, 1944

Dear Mr. Hughes:

Your letter of the 22nd at hand. It seems hardly practical to hold up sending out literature and price-lists pending our final definite agreement on price to be charged International at Vancouver as this price is merely for the purpose of equalization of taxes and is to keep the corporation out of the excess profits bracket. In regard to chopper prices it really makes little difference but I would suggest that the jobbers be given the same discount on choppers that they get on units. Thus the dealer would pay 70c the jobber 55c or 60c depending upon his order size. We have this 70c dealer price

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

in effect on choppers to dealers and are placing the 55c and 60c jobber prices into effect immediately. We pay 4c more for choppers than formerly and we have one dickens of a time to get any. Your order for 500 catches us without any on hand tho we have been trying to get some on orders placed last July and Auygust. We have got to get together on what we are going to do in regard to these prices and how we are to handle same before it is too late. The earlier we put this added charge into effect the better chance we have of making it stick. I will be out there soon to see my family and to get this agreement made. Meanwhile we will bill you as we do the other distributors at 50% of our list prices with the understanding that we will allow the corporation to earn up to \$10,000.00 but nothing over that sum.

Incidentally I am trying to get for International Electric Fence of Vancouver the distribution of the Ariens*Tiller for the states of Oregon & Washington. This is the best rotary tractor tiller made. At present Ed Short is the distributor but he also represents the competing companies.

The Ariens garden tractors are made at Brillon, Wisconsin and the line is fairly complete from one horsepower to fourteen horsepower four cylinder jobs. I believe that our wide acquaintance among hardware, implement and feed dealers thruout the two states would enable us to get good distribution

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

immediately. I want to come back to Vancouver at an early date and live there. Naturally, we cannot do much with garden tractors until after the war. I will then make my occasional trips to Chicago via plane.

My application for a certificate of war necessity for a used truck was turned down so that I cannot even get one quart of gasoline. This knocks my desire to put a man on the road in this area into a cocked hat.

It seems definitely undesirable to ship those 106 units all the way back to Minneapolis just because one wire has to be unsoldered from one point to another point a half inch higher. I would offer some one a contract to do it at so much per unit say 15c per unit which would include resealing and repackaging. He should easily be able to do 20 units per hour. Incidentally we will pay the 15c per unit if you will attend to the rest of the detail. This would save time and money. Besides those trucks are busy on war orders these days.

We will not make any change in our present 50% of list billing now but will adjust the overcharge later. This simplifies our bookkeeping and billing as it puts all distributors on a one price basis. If you have another workable method which we can agree on and put into force immediately that will be alright too. I just do not wish to let this matter run along until we find we are out on

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

for the delay in payment. That would be too bad but, as they say, if we had not made the profit we would not have to pay it.

I do not need to tell you, of course, that your plan of raising the price on fencers in order to take up the profit here is loaded with dynamite, and might "go off" any time. It is a direct violation of the law and although I do not have much in the way of money I still value it and my freedom of being able to be out on the streets too much to take part in that kind of an arrangement.

Both our price here and yours are frozen and neither of us can raise our prices or lower our discounts to dealers and jobbers. We here are not allowed to raise our prices to our dealers and jobbers above our past printed schedule of prices charged to them in the past, and likewise the manufacturer is not allowed to raise the price to his outlets. I have this direct from OPA headquarters by submitting a hypothetical case. It is my humble opinion that you are playing with fire in trying to put over the arrangement contemplated. As suggested above, I am too old now to spend 10 or 15 years in the klink and pay three times the amount of what the tax would be if figured regularly. As stated in previous letters I firmly believe there should be no change anywhere in prices and salaries should be credited as usual.

Since Mr. Soper is included in any plan made

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

or contemplated I will send him a copy of this letter so the two of you can mull it over and decide your future actions.

We have about 40—#411's on hand and so far those we have opened up none of them have the 1 watt $1\frac{1}{2}$ meg resister you suggest we replace. There are just three resisters in the unit, 6, 12, and 13,000. When the 2 watt $1\frac{1}{2}$ or 2 meg resisters arrive we will see what they do to the unit.

I will await with interest your explanation of how you can make a unit which a person cannot feel and still be effective in holding stock. I assume that your test for a person does not apply to one standing on the ground and actually shorting from fence wire to ground with his hands, but that is what the customer wants to know, viz: the amount of "kick" it has when the animal touches it.

The volt meter just arrived since I started this letter. Thanks a lot. I will have to get acquainted with it first and then it will be a big help on the road.

Regarding prospects for additional business this year, Mr. Soper, as you know we have 4,000 units, plus, in stock now, mostly 106's. Conditions are such that one cannot be sure but I believe we have a sufficient stock of everything, with the exception of #400's, to take care of this year's business. Whether or not we will have a large inventory at the end of the year is problematical.

We should have 40 or 50 #400's at once, Mr.

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

Turk, to fill our orders. Please rush them out as soon as possible.

Those blue cases are not too hot, are they? The hangers come off and that little extra strip around the opening of the case certainly is not the best kind of arrangement that could be had to strengthen the case. I hope we can have a stronger and more substantial case some day.

Yours very truly,

INTERNATIONAL ELECTRIC
FENCE CO.

By

P. S.

Mr Volheye just called me on the carpet via telephone. He objects to our representing to him that #411 was approved by Wisconsin. He had just received word from there today that it had been presented for approval and turned down for reasons familiar to you. Also objects to having "Oregon approved" on the name plates, and to selling #106's in Oregon. Has instructed several to return them. Says this is a violation of the law on our part as well as the dealer, to sell them in Oregon, that applying to ANY unapproved unit of course. You will have to step lively to get these units where he will approve them, and it should be done quickly in order to keep him from thinking he has been further misled. We do not want to

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

get in bad there, there is too much at stake. He impresses me as being willing to play along with us on approvals but he wants the cards on the table and all in a straightforward way.

[Letterhead] International Electric Fence Co.
Chicago 7, Illinois
Apr. 27, 1944

Dear Mr. Hughes:

I think that you are in error about the illegality of our raising our prices to the level of the prices charged our other distributors. The law or rulings as I have interpreted them distinctly approve of price raises within the shell. In other words you can with entire justification equalize prices charged two different jobbers by raising the lowest to the level of the highest so long as the price was in effect prior to March 1942 and as long as the firms are in the same classification.

I doubt that there can be any objection to the move on the part of OPA or the Internal Revenue Department. On the other hand I have no desire to make a test case of the matter nor any desire to ask their advice on the subject. Preferably we should get our advice from tax experts and corporation attorneys. I have no desire to avoid my fair share of taxes but on the other hand as long as we can legally avoid excess profits taxes on our partnership we should make every effort to do so. Our taxes are going to be very heavy anyway

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

and excess profits on our partnership amounts to double taxation. I want to see your attorney about this matter and with an open mind because I believe that he will give you the same answer as my attorney has given me, namely, that it is entirely legal and feasible so long as we are in agreement on it. As stated we are not trying to do you out of a single penny but we are trying to avoid double taxation.

I just received in this mornings mail a report from Wisconsin on our #411 unit indicating that they will approve it with an output of 5.7 RMS or 5.3 DC. Naturally we will have them approve it with that output tho it is less than we want and less than we are going to get. Their tests indicate that the current output MUST BE 4.55 ma before the current can be noticed and that many individuals Could Not Notice The Output until the output reached 5.35 mas. No Freezing Was Encountered Even With The Full Output Of The Unit of 15.6 ma. DC. This is the basis for our appeal for an increased current output approval to follow the original approval soon to be in effect.

I am sending this report on to Mr. Volheye for his examination and for his approval of a tentative nature. Will forward a unit also that he may examine same and have it on hand for comparison. Later when I get out there I will demonstrate to

(Testimony of George N. Hughes.)

Exhibit A-8—(Continued)

him the truth of my assertion that this form of current is not noticeable and is not liable to cause freezing at values much higher than ordinarily deemed dangerous.

The other units we have will be approved without any question with the exception of the 106. This is why I am so anxious to get the #411 approved and to get you started on this model which is actually superior to the 106 at the 15.6 DC output. The #500 will also be good when Soper puts the new transformer in it. These are being made now. They will also power the new #400. Deliveries of new #400 are scheduled for sometime next week. Will ship you 50 to a 100 next week. direct from Minneapolis.

We are having some difficulty in getting heavy duty $11\frac{1}{2}$ meg resistors to use in the #411.

Sincerely,
/s/ DICK.

Admitted Jan. 14, 1949.

Mr. Snow: We haven't had a chance to read them.

The Court: They will be admitted anyway, but if there is anything irrelevant or immaterial, you can call attention to it later. The clerk will mark them admitted on the same basis as the other letters. [185]

Q. (By Mr. Boldt): Will you look at those and

(Testimony of George N. Hughes.)

see whether or not they are letters received from Mr. Turk, and in some instances copies of letters you wrote him, containing material relative to the matter discussed in the other letters?

A. Yes; they are. Correct.

Q. Now, let me ask you—or call your attention if I may—will you follow me to see if I read it correctly?

Mr. Snow: I know you will read it correctly.

Q. (By Mr. Boldt): In the March 25, 1943, letter from Mr. Hughes to you—

Mr. Lyon: Mr. Turk.

Q. (By Mr. Boldt): Turk to you, I ask you if the following appears.

Mr. Boldt: I would prefer if you would follow me.

Q. (By Mr. Boldt) (Continuing): “We will henceforth send both Klint’s and Wyatt’s orders direct in order to simplify bookkeeping. I am not quite willing to take Klint into my confidence under present conditions but the deal will be the same as with Wyatt whom we can count on for full cooperation. This will restrict our financing to some extent but should cause no difficulty. Somehow we are going to get [186] an increased output.”

That was an instruction to you dated March 25, 1943, and about a month previous to the letter you wrote to this concern telling that their requirements would have to come direct from Chicago?

The Court: This was March 13, 1944.

(Testimony of George N. Hughes.)

Mr. Snow: That is right. This is 1943.

Mr. Boldt: All right; we will get on to it. September 9, 1943.

Mr. Snow: I think the record should show——

Mr. Boldt: That I was mistaken as to the date—that is right.

Q. (By Mr. Boldt): This was over a year prior? A. That is right.

Q. And in this letter Mr. Turk instructed that shipments other than to Washington and Oregon were to be made direct from Chicago?

A. That is right.

Q. Now, Mr. Turk was president of the Washington corporation at that time?

A. That is right.

Q. Now, September 9, 1943: "Do not ship any units or repair parts from Vancouver to California or Idaho points but refer such orders to the distributor or directly [187] here. This is solely to keep things straight and to avoid any friction with Klint or Wyatt."

Did you receive those instructions?

A. I did.

Q. April 3, 1944—this is the one I referred to shortly before that one, or in the vicinity of that one—"Above all else we wish to avoid the excess profits tax and we also wish to divide the proceeds equitably. Our company here could arbitrarily assess you or rather our company there a higher price but this we are reluctant to do. In the event

(Testimony of George N. Hughes.)

that we find that we have overestimated our income there we can give you a credit on this overcharge at the end of the year thus bringing the corporation profit up to the ten thousand permitted before the assessment of the excess profits tax. Will this be agreeable to You?"

Do you recall that? A. Yes.

Q. And what was your response to that? Was it agreeable to you? A. No. No.

Q. That was a bone of contention between you?

A. Yes, absolutely.

Q. You objected to that procedure, didn't you?

A. That is right.

Mr. Snow: Where is the letter? [188]

Mr. Boldt: We will come to it.

Mr. Snow: You are asking him for a statement.

The Court: Proceed.

Q. (By Mr. Boldt): In the same letter, same date: "I have the advice of two very competent tax experts, one in Minneapolis, to help me investigate this problem and you can get some one there if you like to check the legality of this move and its accomplishments. We want to work this thing together for our mutual satisfaction and well being. I am quite certain that we can use a credit for the overcharge as a balance with which to even up our corporate income at Vancouver. I do not know of any other way to do so without getting away from impartial division of income. Bear in mind that we are agreeable to kicking back to

(Testimony of George N. Hughes.)

you your share of the increased prices and that undoubtedly you will net several hundred per cent more from this kick-back than you could net from your share of that added income in excess of ten thousand dollars after the government got through with it. If you have any other plan please state it at once."

What was your response to that? Did you agree to any such thing?

A. Oh, no, I didn't agree to it. No.

Q. Now the letter of April 12, 1944. [189]

A. I protested it.

Q. This is from Turk to you: "I believe that it is desirable to hold our list prices to \$26.50 on the Number 500 and Number 411. We will still make a satisfactory margin of profit even though we bill them to you at \$13.25 as we are doing now until we get this tax muddle straightened out. We do not like to take an arbitrary stand and we are not doing so. In the event that some other means is found to handle the excess profits that I feel sure we are going to be subjected to and that we can agree on this method then we can credit you for the overcharge. We start the charge now because you have stated that we cannot make this charge retroactive. I think that we should if it is possible and particularly so if purchases of controllers from now on do not number many. There is no desire on our part to get more than our share of the profits and

(Testimony of George N. Hughes.)

it is clearly understood that some form of kick back would be arranged for your share."

Did Mr. Turk so write you?

A. That is right.

Q. Did you even then agree?

A. I remember particularly protesting against the tax proposition.

Q. That is right. Now, your letter of April 19, 1944: "I had expected a reply before this in answer to my [190] letter outlining a plan for caring for the excess profits tax, but to date there is no word in reply to that letter. The reason I bring this up is that I am getting out my price lists and I must know just where we stand as to prices. As the attorney here says, our set up here is essentially a copartnership, since it has always been our practice to divide the profits equally as part of our wages and the corporation is not expected to make much of a profit. The corporation was formed in order to protect each of us in the event of accidents or other mishaps and is not expected to accumulate wealth, or profits. For this reason he thinks, and so do I, that it would be better to handle it in the way mentioned in my former letter, in order to get the profits where it is intended they should go, to us individually instead of the corporation. Raising our cost prices now and later issuing a credit of any kind would be juggling the accounts without any particular benefit, since it would have to be accounted for next year in some way. For these reasons I believe

(Testimony of George N. Hughes.)

we should maintain our past schedule of prices as printed on our dealers and jobbers lists, also our costs."

And then the letter goes on to other subjects. Did you write that? A. I did.

Mr. Lyon: What was the date? [191]

Mr. Boldt: April 19, 1944.

Q. (By Mr. Boldt): And then April 21, 1944, a few days following did you get this letter: "My specialist on corporation taxes states that your plan of reselling units to the corporation will not be feasible regardless of what your attorney may have told you. He states that the sale of these units to stockholders at less than the repurchase price will be held as a dividend and will be part of the corporations profit and hence would still be of no use in holding the excess profits under control.

"He states that it is possible to invoice you on one invoice for the errors in invoicing since January 1, 1944. This would be a difference between the invoiced prices and the price other distributors pay or fifty per cent off list. This will involve no falsification of records nor will it involve any difficult book work on the part of either company. In your report for income taxes you merely report on the cost of goods sold, in this case, several thousand dollars more than it would have been, otherwise. We will have to figure out some way to compensate you for your half of this increased price but this should not be too difficult. Your suggestions in this regard will be welcomed."

(Testimony of George N. Hughes.)

Did you receive that? [192] A. I did.

Q. Did you ever receive one penny, or the Washington corporation one penny, of that?

A. None whatever.

Mr. Snow: From whom?

Mr. Boldt: From Turk or his Illinois concern.

Q. (By Mr. Boldt): Now, on April 24, 1944, did you receive the following letter, Mr. Hughes: "Your letter of the 22nd at hand. It seems hardly practical to hold up sending out literature and price lists pending our final definite agreement on price to be charged International at Vancouver as this price is merely for the purpose of equalization of taxes and is to keep the corporation out of the excess profits bracket."

Then he goes on with this: "Meanwhile we will bill you as we do the other distributors at fifty per cent of our list prices with the understanding that we will allow the corporation to earn up to ten thousand dollars but nothing over that sum."

And then several paragraphs skipped: "We will not make any change in our present fifty per cent of list billing now but will adjust the overcharge later. This simplifies our bookkeeping and billing as it puts all distributors on a one price basis. If you have another [193] workable method which we can agree on and put into force immediately that will be all right too. I just do not wish to let this matter run along until we find we are out on a limb with the dawgoned limb about to break off

(Testimony of George N. Hughes.)

with us. As I see it, all we have to do is figure out the difference between the two billing prices and arrange to reimburse you for your half of same. Similarly if I get separated from the payroll this difference in billings can be used to balance up our drawings. We still get half the profits and salaries with minimum taxation."

Did you receive such a letter? A. I did.

Q. And to one of these letters did you write, or reply, on April 25, 1944: "Your letter of the 21st regarding the suggested plan of selling and reselling the fencers is received. Your income tax man is correct, probably, in his statement. That has been recognized by both my attorney and myself. The plan was suggested only because you did not approve of handling it the same way we did last year and also for the reason that I could not agree with your suggested plan of raising prices on us."

Did you so inform Mr. Turk? A. I did.

Q. "I do not need to tell you, of course, that your plan of raising the price on fencers in order to take up the [194] profit here is loaded with dynamite, and might "go off" any time. It is a direct violation of the law and although I do not have much in the way of money I still value it and my freedom of being able to be out on the streets too much to take part in that kind of an arrangement."

Did you so advise Mr. Turk? A. I did, yes.

(Testimony of George N. Hughes.)

Q. And on April 27, 1944, did you receive, among other things, the following remarks on the same subject: "I think you are in error about the illegality of our raising our prices to the level of the prices charged our other distributors. The law or rulings as I have interpreted them distinctly approve of price raises within the shell. In other words, you can with entire justification equalize prices charged two different jobbers by raising the lowest to the level of the highest so long as the price was in effect prior to March 1942 and as long as the firms are in the same classification."

That is O. P. A. stuff, I presume.

"I have no desire to avoid my fair share of taxes but on the other hand as long as we can legally avoid excess profits taxes on our partnership we should make every effort to do so. Our taxes are going to be very heavy anyway and excess profits on our partnership amounts to double taxation. I want you to see your attorney about [195] this matter and with an open mind because I believe that he will give you the same answer as my attorney has given me, namely, that it is entirely legal and feasible as long as we are in agreement on it. As stated, we are not trying to do you out of a single penny but we are trying to avoid double taxation."

Did Mr. Turk write you to that effect?

A. He did.

(Testimony of George N. Hughes.)

Q. Now, on September 27, 1947—1944—excuse me——

Mr. Boldt: This series should be attached to the latter series but it doesn't make any difference.

Mr. Snow: I have no objection, your Honor.

The Court: Very well.

Mr. Boldt: The last page on this one should really be with a new series because these all come prior to the buying out and the last series comes after the buying out.

The Court: Mr. Snow has no objection, no objection to changing that.

Mr. Snow: No.

Mr. Boldt: Yes. All right.

Mr. Snow: I don't know what all this has to do with trade mark infringement.

Mr. Boldt: I think it has a great deal to do with it. [196]

The Court: It has a bearing on your letters.

Mr. Snow: My letters were directed to that allegation that he made that he only had the states of Washington and Oregon. That was the purpose of those letters.

Mr. Boldt: I brought this out to show why it was done, at the instructions of your client.

The Court: I don't want to take a lot of time examining other than signatures.

Mr. Boldt: I will have these stapled together the same as the other, if you don't mind.

The Court: They are arranged chronologically?

Mr. Boldt: Yes.

(Testimony of George N. Hughes.)

The Clerk: Defendant's Exhibit A-9 marked for identification.

(Documents referred to marked Defendant's Exhibit Number A-9 for identification.)

Q. (By Mr. Boldt): Would you look at these letters, Mr. Hughes, and tell us whether they are letters received by you from Mr. Turk, or copies of letters by you to him?

Mr. Snow: I have no objection to the letters provided my objection may be reserved to look them over in detail.

Mr. Boldt: That is all right. [197]

A. That is correct.

Mr. Boldt: We offer A-9 in evidence, if your Honor please.

The Court: They will be admitted.

(Defendant's Exhibit Number A-9 for identification received in evidence.)

DEFENDANT'S EXHIBIT No. A-9

[Letterhead] International Electric Fence Co.
Chicago 7, Illinois
July 15, 1944

Mr. G. N. Hughes,
2215 Main Street.,
Vancouver, Washington

Dear Mr. Hughes:

I hardly think that the agreement is fair, in that it binds only the second parties. In other words you could sell any make of fencers or even

(Testimony of George N. Hughes.)

Defendant's Exhibit A-9—(Continued)

manufacture them and yet I would be powerless to operate in that territory. As you know I have no intention of engaging in sales in your territory and I believe that you intend to continue to handle my product on the terms we agreed upon verbally.

I think that in selling my stock that I really am the one that should be protected because the good will of the company is an asset on which no attempt was made to place a value, but which was recognized. Nevertheless, in our verbal agreement, through the mutual acknowledgement, that hereafter the billing price is to be the same as charged our other distributors, namely 50% of the list prices. It is my belief that no agreement is as satisfactory as that one founded upon the mutual need of each party for the other as regards services and products.

I have not tried to bind you in any way to force you to buy my product, but have taken it for granted that this is your intention. It is my intention to protect your territory and it is to my advantage to do so, just as I believe it to be to your advantage to continue buying from me.

I think the mutual advantage is more important than any agreement and as far as I am concerned no agreement is necessary.

Yours sincerely,

/s/ DICK.

RHT:mg

(Testimony of George N. Hughes.)

Defendant's Exhibit A-9—(Continued)

[Letterhead] International Electric Fence Co.
Chicago 7, Illinois
July 26, 1944

Mr. G. N. Hughes
2215 Main Street
Vancouver, Washington

Dear Mr. Hughes:

Your letter just received and dated July 24th is a severe disappointment to me in that it appears to be a polite but firm effort to do me out of the goodwill value in the business I built up, namely International Electric Fence, Inc. I was foolish enough to sell my stock without any effort to bind you to any hard and fast set of rules. I do not like to tell any man what he can do and what he cannot do and prefer to leave it up to him to do the proper thing. It was understood that in lieu of the salary or profit that I have been getting and which I had a reasonable hope to continue to get that I would increase the cost to you of this merchandise by approximately $33\frac{1}{3}\%$. This you agreed to and I agreed to. When you start to manufacture or handle another make of unit you immediately cut me out of my proportionate share of this income which was mine before the sale and which according to our agreement I expected to get following the sale. Had I signed the agreement you sent to me for signature I would have been bound so tight that I would have been help-

(Testimony of George N. Hughes.)

Defendant's Exhibit A-9—(Continued)

less. My answer to this proposition is a very firm No and it hurts me that I have had to answer to any such proposition at all

Please let me know soon regarding the disposition of the remaining \$6400. due me for salary. I have every desire to be fair and agreeable but I will not be by-passed in this manner. Our verbal agreement was otherwise and my assumption was that you would handle International exclusively.

Sincerely,

/s/ R. H. TURK.

[Letterhead] International Electric Fence Co.

Chicago 7, Illinois

September 18, 1944

Mr. G. N. Hughes

2215 Main Street

Vancouver, Washington

Dear Mr. Hughes:

In your report there are two entries for income taxes and the reason for the two is not understood by me. One is the allowance for income taxes \$421.33 and the other is the \$289.13. The \$289.13 is understandable but I believe that the \$421.33 is in some sense a duplication.

Would also prefer to have the \$6448.00 salary note in my possession. The interest rate must be 6% and it should bear the July 1st dating. The reservation can be incorporated into the note or

(Testimony of George N. Hughes.)

Defendant's Exhibit A-9—(Continued)

entered on the back as an endorsement. Since the intention is to discontinue the corporation the note should be personal. It would suit me best to give my note subject to payment only if additional income taxes are levied which I do not believe will be the case. If this were the case I would have the use of that money. In the other instance you have the use of it. I want either cash or interest upon the money. Putting the money in escrow will benefit neither of us. I can use the money to advantage of both of us in the business here. The income tax on this has already been paid and it seems foolish to be forced to pay 12% interest on borrowed money at this point and have that money lying idle in the bank.

Sincerely,

/s/ R. H. TURK.

[Letterhead] International Electric Fence Co.

Chicago 7, Illinois

September 27, 1944

Mr. G. N. Hughes

2215 N. Main Street

Vancouver, Washington

Dear Mr. Hughes:

Our agreement is to the effect that I am to continue to draw my share of the profits in International Electric Fence Company, Inc. thru an increase in the prices roughly approximating

(Testimony of George N. Hughes.)

Defendant's Exhibit A-9—(Continued)

331⅓%. This should not involve WPB regulations as it has nothing at all to do with a normal price increase but refers entirely to a share the profits arrangement. If you desire, and I believe it may be advisable, it will be well to draw up a separate agreement covering this point.

In asking me to ship you units at the old price you are asking me to forget about this agreement between us. In effect you are asking me to give you that business out there at less than 50% of its value. This I will Not Do. I will be out there to see you soon and at that time we can decide between us whether it is to peace or war And When I say War I Mean Just That.

Sincerely,

/s/ R. H. TURK.

October 24, 1944.

Mr. R. H. Turk,
International Electric Fence Co.
910 West Van Buren St.
Chicago 40, Illinois.

Dear Mr. Turk:

Thanks a lot for your "nice" letters of the 20th and 21st. In a way I glad to have them in my possession. They would make very interesting material in court in the event occassion should arise to use them, which I sincerely trust will not happen.

(Testimony of George N. Hughes.)

Defendant's Exhibit A-9—(Continued)

However, I am very sorry you feel bitterly toward me. There probably is no use in referring to my endeavor to get you to come in with me on a much more expanded basis of business than we had been operating under before. Anyway they say it is "good for the soul" to get such feelings out of the system and since you have had your fling at lambasting me to your own satisfaction do you not think it would be a good idea for us to consider matters in a business like way and cut out the wrangling? I do for one, and I am more than willing to do my part.

One of our chief differences is the matter of policy on prices, that is, whether it will be to the advantage of either or both of us to buy or sell at such prices as will make for a larger volume of business with a relatively smaller margin of profit or whether it would be better to accept a smaller volume and make a larger percentage on the amount sold. We seem to differ quite materially on this question.

Just as an illustration, and to allow you to make the decision in this case as to which is to your own best interests, we ask you to kindly cancel our former orders for battery controllers #350 and #10, at the old prices, and we herewith submit to you our order #1153, this date, for fencers as follows:

(Testimony of George N. Hughes.)

Defendant's Exhibit A-9—(Continued)

8—#350 fencers at 50% of list price

10—#10 " " " " " "

or in lieu of above,

16—#350 " " former prices

40—#10 " " " "

This is a question now for your own decision, as to whether you will make more by selling me the smaller quantity at the higher prices or the greater number at our old former prices.

In order that you may know I am not getting all the difference in the margin, I will say that we were much surprised to-day to receive a jobber order for 20 of the #10's and 5 of the #350's. We have a few dealer orders on hand for both numbers.

It is my firm conviction that it is definitely to the interest of both of us to retain our jobber business, as in the past, and accept the smaller margin of profit for the increased volume of business. We might just as well have this business as not. It will make very little difference in our dealer trade. However, especially in this instance, the decision is up to you. They are your goods, or merchandise, to do with as you may deem best. After we have purchased them from you, at whatever price, it is then up to us whether or not we care to accept the smaller margin of profit, which would be practically nil in the event you choose to charge the higher price.

(Testimony of George N. Hughes.)

Defendant's Exhibit A-9—(Continued)

We will appreciate a word from you as to your decision.

Yours very truly,

INTERNATIONAL ELECTRIC
FENCE CO., INC.

/s/ G. N. HUGHES, Mgr.

Purchase Order
International Fence Co., Inc.
2215 Main Street—Phone 1265
Vancouver, Washington

Date Oct. 24/44

To International Elec. Fence Co.

Address 910 W. Van Buren, Chicago 40.

Please enter our order for the following:

Ship to us.

Address..... How Ship Freightways

Terms: 2% 10th Prox. When Wanted At Once

Quan.	Description	Price	Unit
8	#350 fencers @ 50% of list price		
10	# 10 fencers @ " " " "		
	or in lieu of above ship—		
16	#350 fencers at former price		
40	#10 " " " "		
50	Condensers for AD 31's—		

Prong type—

(Testimony of George N. Hughes.)

Defendant's Exhibit A-9—(Continued)

Order Number: No. 1153

Invoice each order separately

International Electric Fence Co., Inc.

By /s/ G. N. Hughes.

Rejected.

[Letterhead] International Electric Fence Co.
Chicago 7, Illinois
October 25, 1944

Mr. G. N. Hughes
2215 Main Street
Vancouver, Washington

Dear Sir:

Your order #1153 has been received and is being rejected. It is true that in this order you offered the price agreed upon at the time I transferred my stock to you. However the attempt to evade paying the agreed upon prices caused the cancellation of your sales franchise and not until you see fit to sign a contract calling for handling International Electric Fence exclusively will you be allowed to purchase more controls.

To date the territory has not been allotted to anyone else tho I have had many applications for the territory. Like yourself I hate to see us both take staggering losses because we cannot agree and would rather settle the matter peaceably than to go to court as it seems we must inevitably do unless you should decide to carry out your end of the

(Testimony of George N. Hughes.)

Defendant's Exhibit A-9—(Continued)

bargain and to go a step further. In other words originally nothing was said about handling the line exclusively but now that is any essential to any agreement.

I figure that you have already taken me for \$15,000 (my estimate). Naturally I am not one to take it lying down and figure as long as you are forcing me to take a loss that you might as well take one too, hence the reason for the price war to be carried on until one or the other of us says that he has had enough.

My application for the International trademark has been accepted and my patent attorney states that your right to sell under that name is limited to the merchandise purchased from me. This means that you must have given your attorney the wrong idea as to the origin and the dates of organization of our respective companies.

It may interest you to know that the #600 unit shown you falls within the specifications set up by Wisconsin with 365 milliamperere peak limited to .0002 seconds and with more than 30,000 volts. Wyatt sold 22 one day from the sample I left with him. Volheye approved the controller subject to Wisconsin approval. In other words he approved the ideas contained in it. The unit has several patentable ideas contained in it and the patent has been applied for.

It is my intention to lower prices to meet com-

(Testimony of George N. Hughes.)

Defendant's Exhibit A-9—(Continued)

petition and etc. but to have anyone try to force me thru misrepresentation goes against the grain. If you had signed up and then approached me with your plan I would have looked upon it more favorably.

The decision on this matter rests with you. The contract is in your hands to sign. You can either sign it or not sign it. I will hold off another five days or until October 29th. If you decide to sign up you can wire me otherwise we will consider that you still figure on chiseling on the deal and make arrangements accordingly.

Sincerely,

/s/ R. H. TURK.

Admitted Jan. 14, 1949.

Q. (By Mr. Boldt): They are those letters?

A. That is correct.

Q. Now—after the date you bought out Mr. Turk's interest in the Washington concern, July 1, 1944?

A. That is right.

Q. Now, after that time what position did he take with reference to continuing to share in the income of the Washington corporation?

A. If I understand you correctly—

Q. What was the result of his contentions about it? What did he contend?

A. He contended that he was entitled to raise the price one-third in order that he might continue

(Testimony of George N. Hughes.)

to receive at least half or even better than half of the net profits of the corporation. That was his contention.

Q. Yes. In other words, by raising the price one-third, that would amount to one-half of the profit, or more, perhaps and notwithstanding you had paid him for his [198] stock in the Washington corporation, he should continue to receive half of the profits in that? A. That is right.

Q. Did you agree to that? A. No.

Q. Now, among other things, in the correspondence, on July 15th—

The Court: They are all after what date?

Mr. Boldt: July 1, 1944.

Q. (By Mr. Boldt): On July 15, 1944, did he say among other things in a letter of that date: "Dear Mr. Hughes: I hardly think that the agreement is fair, in that it binds only the second parties. In other words you could sell any make of fencers or even manufacture them and yet I would be powerless to operate in that territory. As you know I have no intention of engaging in sales in your territory and I believe that you intend to continue to handle my product on the terms we agreed upon verbally."

Did he so state? A. Yes.

Q. And: "I have not tried to bind you in any way to force you to buy my product, but have taken it for granted that this is your intention. It is my intention to protect your territory and it is to my

(Testimony of George N. Hughes.)

advantage to do so, [199] just as I believe it to be to your advantage to continue buying from me."

Did he so state? A. That is right.

Q. "I think the mutual advantage is more important than any agreement and as far as I am concerned no agreement is necessary."

A. That is right. That is what he wrote.

Mr. Snow: Don't you believe that while your are talking about an agreement that that should be put in evidence?

Mr. Boldt: Have you got it?

Mr. Snow: We have a copy.

Mr. Boldt: If you want it in evidence, I have no objection at all, and along with it we will put the one that you came back with. I am going to do that next, Mr. Snow. At the same time we will put that one with it. Your reply to it. Neither of which were executed.

Mr. Snow: O. K.

Q. (By Mr. Boldt): Now this letter of July 26th, I will ask you whether or not Mr. Turk stated in the letter of that date, among other things: "Your letter just received and dated July 24th is a severe disappointment to me in that it appears to be a polite but firm effort to do me out of the [200] goodwill value in the business I built up, namely International Electric Fence, Inc. I was foolish enough to sell my stock without any effort to bind you to any hard and fast set of rules."

Did he so state that? A. He did.

(Testimony of George N. Hughes.)

Q. Furthermore, did he say: "It was understood that in lieu of the salary or profit that I have been getting and which I had a reasonable hope to continue to get that I would increase the cost to you of this merchandise by approximately thirty-three and one-third per cent. This you agreed to and I agreed to."

Did he so state that? A. He did.

Q. Did you ever agree to any such thing?

A. I never agreed to it.

Q. Furthermore, in this letter, did he make a demand on you for the immediate payment of the sixty-four hundred dollars salary which was not to be paid for five years from that time? Is that right?

A. That is right.

Q. And did he make a similar demand in the letter of September 18, 1944, demanding that he wanted either the cash or interest in the money when this note had been placed in escrow? [201]

A. That is right.

Q. Now, September 27, 1944, does he state: "Our agreement is to the effect that I am to continue to draw my share of the profits in International Electric Fence Company, Inc. through an increase in the prices roughly approximating thirty-three and one-third per cent."

That is the same subject referred to previously?

A. That is correct.

Q. Did you ever assent that such an agreement was made? A. No.

(Testimony of George N. Hughes.)

Q. Could there conceivably be any such proposition in your——

A. Absolutely none. If I did that he would still be more than one-half partner and there would be no occasion for my buying and paying thirteen thousand dollars for I was getting no benefit.

Q. On October 4, 1944, there is the same trend of correspondence, and this is a long commentary on his proposal and I am not going to read the whole thing, but it is in here if your Honor wants to examine it.

On October 25, 1944, did you get this letter from Mr. Turk? Among other things it states: "Your order Number 1153 has been received and is being rejected. It is true that in this order you offered the price agreed upon [202] at the time I transferred my stock to you. However the attempt to evade paying the agreed upon prices caused the cancellation of your sales franchise and not until you see fit to sign a contract calling for handling International Electric Fence exclusively will you be allowed to purchase more controls."

Did Mr. Turk so advise you?

A. Yes; that is correct.

Q. "And to go a step farther . . . originally nothing was said about handling the line exclusively but now that is essential to any agreement."

Did he so state? A. Yes.

Q. And that letter was several months after you purchased the balance of his interest?

A. Yes; that is correct.

(Testimony of George N. Hughes.)

Q. Now, Mr. Hughes, it has been suggested that reference be made to a form of agreement which apparently was referred to in—it has been suggested that the proposed form of agreement that was referred to in one of the letters and dated, apparently, some time in July, after your purchase of stock, be referred to. Will you look at this?

Mr. Snow: Why don't you clip them together and offer them as one exhibit.

Mr. Boldt: Yes. [203]

Q. (By Mr. Boldt, continuing): Does that appear to be a copy of the agreement form?

A. Yes.

The Court: These were merely proposals?

Mr. Boldt: Yes. Never executed.

Q. (By Mr. Boldt): And the next one is the one that Mr. Wilkinson, attorney in Vancouver, sent along in a letter, a proposed form of agreement that they proposed?

A. Yes; that is right.

Mr. Boldt: Will you mark these?

The Clerk: Defendant's Exhibit A-10 marked for identification.

(Documents referred to marked Defendant's Exhibit Number A-10 for identification.)

Mr. Boldt: May it be admitted in evidence, your Honor?

The Court: Yes.

(Defendant's Exhibit Number A-10 for identification received in evidence.)

(Testimony of George N. Hughes.)

DEFENDANT'S EXHIBIT A-10

[Letterhead] Wilkinson and Langsdorf
Vancouver, Washington
October 13th, 1944

Mr. G. N. Hughes
2215 Main Street
Vancouver, Washington

Dear Sir:

Representing Mr. R. H. Turk, he authorizes me to submit to you a proposed agreement which he says must be signed and delivered at our office, 207 Ford Building, Vancouver, Washington, not later than five o'clock P. M. Monday, October 16th, 1944, otherwise there will be no further negotiations attempting to compromise this controversy.

Yours very truly,

WILKINSON & LANGSDORF

/s/ JOHN WILKINSON

By John Wilkinson

JW/ms

MEMORANDUM OF AGREEMENT

Hughes agrees to purchase from Turk exclusively all electric fences and fence controllers he sells in Oregon and Washington as soon as his present stock on hand is exhausted, for a period of five (5) years from the date of this instrument.

Turk agrees to sell such fences and controllers and other products he distributes for resale to

(Testimony of George N. Hughes.)

Hughes only, in Oregon and Washington, excepting the counties of Baker, Malheur and Wallowa in the State of Oregon, and to see that no other person, firm or corporation under his control makes any quotations on such products or furnishes such products to other persons in Oregon and Washington, excepting the counties above mentioned.

Turk agrees to refrain from circularizing any prices on installation of electric fences or sale of electric fence equipment in the States of Oregon and Washington, excepting the counties mentioned in the preceding paragraph, by himself or through any firm or organization under his control, excepting to Hughes, and all inquiries shall be sent to Hughes at Vancouver, Washington.

Hughes agrees not to circularize Idaho, California, or any other state in the union unless such territory is allotted to him. In the event that Turk is unable at any time to furnish Hughes' requirements in any particular model or models, Hughes may purchase from any source available.

Prices to be charged to Hughes shall be fifty (50%) per cent of the following retail prices, to-wit:

Model AD-21	\$15.00
Model AD-31	18.50
Model 411	26.50
Standard 106	20.00
Model 350 6 volt	12.00
Model 400 6 volt	18.50
Model 500 6 volt	26.50

(Testimony of George N. Hughes.)

Any new or additional models are to be priced at fifty (50%) per cent of the retail price.

Turk agrees that International Electric Fence Co., a corporation, will execute its promissory note to R. H. Turk in the sum of due in five (5) years, the same to be endorsed and guaranteed by Hughes, said note to be escrowed so as not to be subject to negotiation.

Freight will be prepaid by Turk to Vancouver, Washington, on all equipment ordered, subject to two (2%) per discount by 10 prox.

It is understood and agreed that "Hughes" and "Turk" referred to herein represent the under-
signed.

Dated this 13th day of October, 1944.

.....

G. N. Hughes

.....

R. H. Turk

AGREEMENT

[Attached Notation Written With Pen]:

Dear Mr. Turk—

After eliminating the escrow agreement, which the Bank will take care of, this was all Mr. Newby had left of the contemplated agreement. If o.k. please sign and return, and advise Mrs. Turk to act accordingly. Best wishes, G.N.H. [End Note]

Know All Men By These Presents:

That G. N. Hughes and Bertha V. Hughes, hus-

(Testimony of George N. Hughes.)

band and wife, hereinafter called the First Parties, and R. H. Turk and Phyllis W. Turk, husband and wife, hereinafter called the Second Parties, covenant and agree as follows:

Whereas, the First Parties and Second Parties herein are the owners of the stock of International Electric Fence Co., a Washington corporation, and

Whereas, the First Parties have this date purchased the stock of Second Parties in said corporation and received an assignment thereof, and

Whereas, as part of the consideration for the purchase of said corporate stock, it is agreed by the parties hereto as follows:

That in consideration of the covenants and agreements herein contained and the sum of \$10.00 and other valuable consideration, receipt of which is hereby acknowledged, the Second Parties covenant and agree not to sell or offer for sale, either as individuals, members of a partnership, stockholders in a corporation, or employees, any electric fences of any kind or character or accessories thereto of any kind, in the states of Oregon and Washington, for a period of ten (10) years from the date of the execution of this agreement.

It is further specifically agreed by the parties hereto that the corporate income tax for said corporation for the period between January 1st, 1944 and July 1st, 1944, as soon as the same is determined, shall be divided equally between the parties

(Testimony of George N. Hughes.)

hereto, and Second Parties will immediately pay their one-half thereof.

In Witness Whereof, the parties hereto have set their hands and affixed their signatures this day of July, 1944.

/s/ G. N. HUGHES

.....

First Parties

.....

.....

Second Parties

Admitted Jan. 14, 1949.

Q. (By Mr. Boldt): Referring to their memorandum that they proposed after their various correspondence, was there anything in that memorandum agreement by which they sought to reserve exclusive [204] right to the name "International" in the area in which you were doing business?

A. No; I think not.

Q. What was the import of that memorandum? It was simply to require you to buy all your products from them, wasn't it?

A. That is right, and at advanced prices.

Q. Which you did not execute?

A. That is right.

Q. Now, I want to go back, if I may, Mr. Hughes, to one or two things that I am afraid I didn't make plain in my direct examination. First, I would like to have you—

(Testimony of George N. Hughes.)

Mr. Boldt: Will you mark that?

The Clerk: Defendant's Exhibit A-11 marked for identification.

(Document referred to marked Defendant's Exhibit Number A-11 for identification.)

Q. (By Mr. Boldt, continuing): Tell the Court, Mr. Hughes, what Exhibit A-11 is and when it was made and what it is.

A. This is a list of the assets and liabilities that Mr. Turk had at the time we originally started the corporation, October 1, 1941.

Q. And what is the letter attached to it?

A. It is a letter from me to Mr. Schaefer. [205]

Q. And submitting the information attached in the attached list; is that correct?

A. That is right.

Q. Now, this letter and memorandum was prepared prior to the incorporation of the company; is that right, Mr. Hughes?

A. That is right.

Q. Now, Mr. Hughes, in this letter, this note, which you sent to Mr. Schaefer, it reads as follows:

"Mr. Schaefer: I assumed from your questions of yesterday that you might not have the complete information regarding the capital of the corporation. The inclosed is the set up at start of business." "This was all owned by Mr. Turk and I paid him two thousand dollars cash personally for one-half interest in the business. This two thousand dollars did not go into the business, it was to Mr.

(Testimony of George N. Hughes.)

Turk's own personal account. If any further information is needed please advise."

Did you so advise Mr. Schaefer?

A. That is right.

Q. And in examining this itemization of Turk's assets, I notice that the physical assets, cash on hand, and the cash in the bank, and the accounts receivable, and the merchandise and stock and repair equipment all came to a figure of—you can't see this, of course—\$3,414.78. Is [206] that right?

A. That is the way I recall it.

Q. And to that was added a figure, business organization valuation, good will, two thousand dollars; is that correct? A. That is correct.

Q. Now, the actual net of physical assets was less than that because there were notes payable to the bank of \$1,414.68; weren't there?

A. That is right.

Q. What bank was that?

A. National Bank of Washington, Vancouver.

Q. So that the net physical value of the assets as agreed to by you and Turk at that time was actual two thousand dollars?

A. That is right.

Q. And to that was added two thousand dollars for the intangible assets, good will and so on?

A. That is right.

Q. And you paid two thousand personally to Turk? A. That is right.

Q. Prior to the incorporation of the company?

(Testimony of George N. Hughes.)

A. That is right.

Q. And that is why on the minutes of the corporation it appears that the capital stock was paid for by both of [207] you transferring the whole interest in the preceding business to the corporation? A. That is correct.

Q. So that actually—now, what lapse of time was there between the time that you paid the cash to Mr. Turk and the time that you actually got the articles of incorporation signed and sent to Olympia?

A. I don't recall exactly but perhaps two or three weeks.

Q. Between the time you paid Turk and you got back and had the articles prepared?

A. It took some time to get them completed.

Q. So that, at the beginning of business the total physical assets that Turk had at that time were evaluated by him and you as being two thousand dollars in value? A. That is correct.

Q. And to that you added two thousand dollars for intangible valuation? A. That is right.

Q. Good will as you described it here?

A. That is right.

Q. Now, at that time, were there any reservations or rights or privileges made?

A. None whatever. Just buying the business.

Q. So that actually, technically, at the time that [208] the corporation was organized you and Turk

(Testimony of George N. Hughes.)

had been partners for whatever period that was in there; is that correct? A. I assume so.

Q. That is what Mr. Schaefer interpreted the transaction to be? A. That is correct.

The Court: Well, were you carrying on business during that period selling these things?

The Witness: Yes; there was no lapse of business.

Mr. Boldt: That is exactly the next thing I was going to ask you.

The Court: And the proceeds that occurred from the business in that period were divided between you?

The Witness: And into the company; yes.

The Court: Did you draw a salary as a bookkeeper?

The Witness: No. From the time we incorporated we each drew a salary.

The Court: No, from the time you deposited two thousand dollars until the corporation was fully organized did you draw a salary as a bookkeeper?

The Witness: Well, I think the funds were all put into the same fund and the corporation assumed them. It is a long while ago and I don't recall exactly.

Q. (By Mr. Boldt): Would it be in this journal, do you think? [209]

A. It could be, I think.

The Court: What was your salary?

The Witness: Before the incorporation?

(Testimony of George N. Hughes.)

The Court: Yes.

The Witness: Twenty-five dollars a week.

Q. (By Mr. Boldt): One hundred dollars a month, in round figures? A. That is right.

Q. And what were the salaries provided for both you and Turk in the new business?

A. I believe it was two hundred dollars a month.

Q. That is what it says in the first minutes.

A. That is the way I remembered it. That is correct.

Q. That is provided for the forthcoming year. Whether a calendar year, it doesn't say. By the way, the book you are looking at now is the original book in which all these transactions were kept?

A. Yes, from the first of October. There is no record of anything prior to that put in this.

Q. Nothing prior to October 1st?

A. That is right.

Q. Now, the next thing that I want to ask you jumps down now—because it is the same kind of thing—and I want to ask you——

Mr. Boldt: Can we have that marked, please?

The Clerk: Defendant's Exhibit A-12 marked for identification.

(Document referred to marked Defendant's Exhibit Number A-12 for identification.)

Q. (By Mr. Boldt): I would like to have you take a look at that, Mr. Hughes, and tell us what that is?

(Testimony of George N. Hughes.)

A. This is a list price that we have mailed out to dealers.

Q. On the other side?

A. This is the original of the settlement between Mr. Turk and myself when I purchased his interest in the corporation on July 1, 1944.

Q. You say it is the original of it—what do you mean by that?

A. I prepared a statement showing our assets, inventories and liabilities, and all of our merchandise stock on hand, cash on hand, and all of our physical assets, then I also figured all of the liabilities including the indebtedness of the corporation to Mr. Turk and myself and the accounts payable which was due.

Q. I don't want you to go into detail. Show it to his Honor. It is a much marked-up hand written thing. Where did you actually make that paper out?

A. I did in the office and then we went out into the truck [211] and figured it over.

Q. Who went out? A. Mr. Turk and I.

Q. Did you have that paper with you when you went out in the truck? A. Yes; that is right.

The Court: We will take an intermission now of fifteen minutes.

(Whereupon, at 11:20 o'clock a.m., January 14, 1949, a recess was had until 11:35 o'clock, a.m., January 14, 1949.)

(Counsel heretofore noted being present, the following proceedings were had.)

(Testimony of George N. Hughes.)

The Court: You may proceed.

Q. (By Mr. Boldt): Now, at the intermission we were referring to this memorandum that you made of the various figures involved in your negotiations with Mr. Turk at the time you purchased his stock on July 1, 1944, and apparently Mr. Turk has exhibited a similar memorandum showing to some extent the total figures that come out the same. Where he got those, I don't know. But, I want you to explain to the Court the method you approached with Turk, you and Turk approached, in determining how much you were going to pay him for the stock in the corporation. Tell us the method.

A. We took the total of the assets.

Q. The total of what assets?

A. All of the assets of the corporation, including cash, accounts receivable, everything.

Q. Are you making any distinction between any physical and intangible assets?

A. The physical.

Q. You are talking about physical?

A. That is what it is, the total of the physical assets.

Q. Now, those physical assets consisted of merchandise on hand and repair stock and the truck and so on?

A. That is correct.

Q. And then what did you do?

A. We deducted the amount we owed, which gave us the net.

Q. Your liabilities were deducted?

(Testimony of George N. Hughes.)

A. The net worth of the corporation.

Q. Then what was the result of that?

A. We divided that by two.

Q. All right.

A. I haven't the figures before me. Something over nine thousand dollars. That is what each one of us would be entitled to.

Q. With respect to the physical assets——

The Court: The physical assets were estimated in [213] the neighborhood of eighteen thousand dollars?

The Witness: Something over that.

Q. (By Mr. Boldt): The net is given \$18,-768.16. Now, the method is all we want, Mr. Hughes. After you divided the physical assets into two, the net physical assets, then what did you do?

A. Then Mr. Turk thought he should have something in addition for the good will of the company for his part of it.

Q. All right. Did you have some dickering and discussion?

A. We discussed that quite a little.

Q. All right; how much finally was paid him?

Mr. Snow: Let him answer the question how he arrived at it.

A. Something over forty-seven hundred dollars. We arrived at that by taking the number of controllers that we had on hand and the figure \$1.50—that would be \$3.00 for each of us—\$1.50 to him and I paid him on that basis for his good will in the company.

(Testimony of George N. Hughes.)

Q. (By Mr. Boldt): All right. Now, actually, at the time that you made this computation you hadn't sold those fencers or had any assurance they would be sold? [214]

A. That is correct.

Q. Was that done in any manner as compensation for the fencers? How did you happen to hit on that idea of figuring the intangible——

A. Mr. Turk felt—I don't know what you would call it—he owned an interest in the company, that is, *an* worth in the company aside from the physical assets. That is, that the name itself was worth something.

Q. That there was some value not on the books?

A. That there was some value not on the books, that is right, and each of us would have one-half interest in whatever that sum was. We figured it at approximately eight or nine thousand dollars.

Q. The total value of that item then would be twice forty-seven hundred dollars?

A. Yes, and we gave him \$1.50 each, which was 4719, I believe the correct amount.

Q. Now, tell us the exact figures on the computation. First, the total. What was that total figure?

A. The total figure was \$35,540.64, assets.

Q. Liabilities? A. \$16,772.48.

Q. Net worth? A. \$18,768.16.

Q. That is enumerated as being net worth?

A. That is right.

(Testimony of George N. Hughes.)

Q. That was physical less liabilities and net worth?

A. That is right, and that was divided by two.

Q. What was that?

A. \$9,384.08. To that we added to Mr. Turk's part of it this \$4719.00, which we agreed upon, which he should have, making we owed him \$1865.70, and——

Q. What was that for?

A. Merchandise purchased but not paid for yet, which we paid with this settlement, however. That made a total of \$15,968.87.

Q. Which was the amount agreed should be paid for his half in the business?

A. That is right.

Q. And how was that money to be paid?

A. I paid him a check of seventy-four hundred dollars. It is right here. \$7,492.96, and retained the balance of six hundred dollars which I paid later after I had delivered——

Q. Six hundred?

A. Six thousand. Pardon me. Which I paid later after he had delivered to me the stock certificates.

Q. Why didn't he deliver them to you at that time? A. They were in escrow in Chicago.

Q. And some ten or fifteen days later——

The Court: Is there any dispute about that?

Mr. Snow: I don't know. This is all new to me.

(Testimony of George N. Hughes.)

The Witness: The checks are there.

Mr. Snow: I haven't heard about this.

The Court: Well, your client knows whether he got the check.

Mr. Snow: There is no question but that he received seven thousand dollars, your Honor.

Mr. Boldt: He ultimately received \$13,492.96.

Mr. Snow: How much?

Mr. Boldt: \$13,492.96. And the one payment was paid shortly following the conclusion of this agreement with him and then the balance was paid with the stock certificates—when they came out from Chicago.

Mr. Snow: There is no dispute.

The Court: Counsel for plaintiff says there is no dispute about that.

Mr. Boldt: Yes.

Q. (By Mr. Boldt): And in addition to this \$13,492.96, what else was given?

A. That was the only consideration.

Q. What about the note? When I say "consideration", I mean—

A. That was taken care of by giving him a note for \$6448 in settlement of his personal account, figuring in the [217] liabilities there.

Q. That is the liabilities? A. Yes.

Q. That represented the payment of all his unpaid salary and any commission?

A. Everything we owed him.

(Testimony of George N. Hughes.)

Q. So that as a result of giving him that note—by the way, that is payable next June, isn't it?

A. Next July, I believe. Five years.

Q. And what was the reason for making a five year period on that note?

A. The reason is that that this was during the War period and salaries were more or less controlled and it was considered by us that there was a possibility that Mr. Turk and I had been allowing ourselves a little high salary and it might not be allowed us ultimately. So that in the event it was not allowed, this note was given so that anything that was charged back to us we could charge it to the note. I had one for the same amount.

Q. You mean an adjustment in case there was some tax liability that hadn't been computed?

A. Yes; that is correct. We couldn't say that was it because the Government has five years to come back on us for these things so that we made the note due in five years.

Q. And that note was placed in escrow in the bank at [218] Vancouver? A. That is correct.

Q. Now, one other thing. During the recess, Mr. Hughes, we looked through this journal which contains all of the financial record of the concern from October, 1941, on, does it not?

A. That is correct.

Q. And we looked through there and does the book disclose—

Mr. Boldt: The book is the best evidence and we would be glad to put it in.

(Testimony of George N. Hughes.)

Q. (By Mr. Boldt, continuing): —anything with respect to payments of commissions to Mr. Turk?

A. They were credited to his personal account.

Q. Were they sizeable amounts?

A. Any amount up to several hundred dollars.

Q. And when, according to the journal, did those payments cease?

A. May, I think, 1943.

Q. That is the last one we could find any record of in this book? A. Yes.

Q. What was the reason why those payments to Turk ceased in May, 1943? [219]

A. Because Mr. Turk diverted shipments to Mr. Wyatt and Klint and there was no commission due him.

Q. And those are the matters he refers to in the letters where he says he will not cheat you out of a penny and there will be a kick back and so on?

A. That is right.

Q. Now, has the company ever been reimbursed, or was it reimbursed in the settlement?

A. No. It was never figured at all.

Q. No allowance was made for it in the settlement, nor has it been compensated for in any way?

A. No.

The Court: Those commissions were on sales outside Oregon and Washington?

The Witness: That is correct.

Q. (By Mr. Boldt): And some of those com-

(Testimony of George N. Hughes.)

missions ran into several hundred dollars, did they not? A. Yes.

Q. Now, of course, what would that indicate as to the interest of the company in that which was being diverted by——

A. Well, the larger his check was the greater interest we would have in it because it would show we did a larger volume of business. [220]

Q. So that in each instance where the book shows he was paid two hundred fifty dollars there would be a substantial sum comparable to that that the company got at the same time?

A. That is right.

Q. Which after May, 1943, was not gotten by the company? A. That is right.

Mr. Snow: I think a question like that, your Honor, will have to be objected to. He ought——

The Court: We won't go into these figures now. I understand his answer. The substance of it is that every time that Mr. Turk got a commission, there was still some amount over the amount of commission that went into the earnings of the corporation.

Mr. Boldt: That is correct.

The Witness: That is correct. That is correct.

Q. (By Mr. Boldt): And out of those earnings, Mr. Turk shared the same as you did on an equal basis? A. That is correct.

Q. That was the intention? A. Yes.

Q. That was the case? A. Yes. [221]

(Testimony of George N. Hughes.)

Q. Now, for his services as president during this entire period up to the time of your buying him out, as president of your corporation, Mr. Turk received, as we have explained, was paid his salary, was he not? A. That is correct.

Q. Now, a few other points and I think we will be finished. One small matter. I notice that on these gadgets, the name plate is physically made a—it is stapled right into the product—is that correct?

A. That is correct. It is riveted.

Q. And was done at the point of manufacture, was it not? A. That is correct.

Q. And then is that the reason why you continued to use the same brand and the same product without changing the plate until the supply of those on hand at the time of your settlement was disposed of?

A. Yes, that is right. They were already on the machines.

Q. Now, in addition to those, there were paper labels or stickers and they fell in the same category; is that correct? A. That is right.

Q. Now, one thing we were a little confused on is that on some of the labels here the words "trade mark" [222] appears underneath the word "International." How did it come about that you used that word "trade mark" and when? Explain to the Court.

(Testimony of George N. Hughes.)

A. Mr. Charles W. Hills Company in Chicago——

Q. You refer to “company.” That is a law firm. We don’t call lawyers company.

A. The Charles W. Hill firm advised me, while these patent matters were pending, registration matters were pending, that we should use the words “trade name” underneath the word “International” so that when we had new decals printed we followed that direction and put “trade mark” under it as our trade mark for “International Electric Fence Company.”

Q. And that was done at the suggestion of the Hill’s firm? A. That is correct

Q. Incidentally, they represented you in two or three of these matters now pending in which Mr Snow’s firm represents Mr. Turk?

A. That is correct.

Q. One other thing. Was there any limitation in the articles of incorporation within the area in which the company was to do business?

A. None whatever.

Q. Was there any corporate record of any kind, in the [223] minutes, anywhere, in which it indicated any such limitation of any kind?

A. No.

Mr. Boldt: I think that is all, unless your Honor has something.

The Court: No.

Mr. Boldt: By the way, the journal book is here and can be made an exhibit. I would be glad

(Testimony of George N. Hughes.)

for your Honor to examine it if you desire. As a matter of fact, Counsel and Mr. Turk have been examining it.

The Court: You may proceed with the recross, Mr. Snow.

Mr. Snow: Pardon?

The Court: Do you have any recross?

Mr. Snow: Yes.

The Court: You may proceed.

Mr. Boldt: The Clerk calls my attention to the fact that A-12 and A-11 have not been admitted. Mr. Hughes' memorandum of the financial settlement, Turk's settlement, July, 1944, and, A-11—list of assets and Turk's liabilities.

The Court: They will both be admitted in evidence.

Mr. Boldt: Yes.

(Defendant's Exhibits Numbers [224] A-11 and A-12 for identification received in evidence.)

DEFENDANT EXHIBIT No. A-11

Balances as of 10/1/41 at Opening of Business

	Debits	Credits
Cash on hand.....	20.85	
Cash in bank.....	36.88	
Accounts receivable	1,263.32	
Mdse. stock on hand.....	543.63	
Repair equipment	350.00	
Office supplies	200.00	
New truck	1,000.00	
Business organization valuation (good will)	2,000.00	
Notes payable (Bank).....		1,414.68
Capital stock		4,000.00
	<hr/>	<hr/>
	5,414.68	5,414.68
	<hr/>	<hr/>

(Testimony of George N. Hughes.)

[Letterhead]: International Electric Fence Co.
2215 Main St., Vancouver, Mashington.

Mr. Schaefer:

I assumed from your questions of yesterday that you might not have the complete information regarding the capital of the corporation. The inclosed is the set-up at start of business. This was all owned by Mr. Turk and I paid him \$2000 cash personally for one-half interest in the business. This \$2000 did not go into the business, it was to Mr. Turk's own personal account. If any further information is needed please advise.

Yours hastily,
/s/ G. N. HUGHES.

Admitted Jan. 14, 1949.

DEFENDANT EXHIBIT No. A-12

[In Pencil]: 7/11/44—1865.79—Int. Elec. a/c.
7/11/44—7492.96—R. H. T. 7/17/44—6000.00—
R. H. T.

[Letterhead]: International Electric Fence Co.
Chicago, New York, Vancouver.

To Our Dealers.

Recent increases in the cost of oil condensers, transformers and other parts together with the difficulty in getting delivery of ordered parts has resulted in a slight increase in dealer prices as is shown by the list below. These prices have been ar-

(Testimony of George N. Hughes.)

rived at in conjunction with our jobbers who have agreed to maintain these prices.

Model	Dealer Price	Retail Price
Model AD-3.....	10.00	14.75
Model 41	13.00	19.50
Standard 106	12.30	18.50
RB-6 6 volt.....	9.00	12.00
RB-10 6 volt.....	10.70	16.00
BG-4 6 volt.....	10.70	16.00
Stock Prod	3.50	5.25
Long Handled Prod.....	5.35	8.00
Choppers65	1.00
No. 80 tube (for Model AD-3).....	.45	.65
No. 879 tube 2x2 (For Model 41).....	1.55	2.30
Neon 1/4 watt.....	.40	.60
Fence Tester50	.75
Warning Signs04	.06
Kwik Klips30	.40
Kwik Gates, Large.....	.20	.30

Insulator prices are changing and there are so many types on the market that we are not listing them here. We carry the three grooved glazed knob in preference to the usual 5½. These are packed in cartons of 100, five cartons to a shipping carton. We also carry large spools or corner knobs in quantity. To save on transportation the dealer should purchase 1000 knobs and specify freight shipment.

INTERNATIONAL ELECTRIC FENCE CO.

Prices on Controllers are F.O.B. your station.

Prices on other items are F.O.B.



(Testimony of George N. Hughes.)

Recross-Examination

By Mr. Snow:

Q. Mr. Hughes, you mentioned you received a letter from Mr. Hill's firm in Chicago telling you to use the words "trade mark" under the word "International." Do you have that letter?

A. I don't think so. I didn't bring up the Hill's correspondence. We have the letters, no doubt, in the office.

Q. When was that letter sent to you?

A. I don't recall. I have nothing to refer to. I can't remember.

Q. Mr. Hughes, I refer you to Defendant's Exhibit A-11, which is this sheet that was furnished by you to Mr. Schaefer, with your letter, undated letter. Have you any idea when you sent that letter to Mr. Schaefer?

A. I have no recollection at all. No. I don't recall it. I really don't remember the circumstances.

Q. Was it your impression that this balance at opening of business you have written at the top of A-11 was the total amount of assets that were going to be the assets of the corporation to be formed by Mr. Schaefer?

A. Yes. That is our statement of the assets. Yes. [225] If I knew what you are referring to—

Q. Would you like to see this?

A. That is the statement of our assets at the starting of the corporation.

Q. Is there anything in this Exhibit A-11 to

(Testimony of George N. Hughes.)

indicate that there was any copartnership between you and Mr. Turk?

A. Anything in that to indicate it?

Q. Yes.

A. That was our joint property, according to Mr. Schaefer.

Q. What is it according to you?

Mr. Boldt: Why don't you let him answer. You asked him a very broad question.

A. I paid Mr. Turk two thousand dollars in cash and he had only two thousand dollars in total accounts receivable and merchandise and then he added to that the good will so as to bring it up to four thousand dollars, so that my two thousand dollars would be one-half of his interest and I paid the two thousand dollars for that half interest, including the good will.

Q. (By Mr. Snow): I am not asking you that, Mr. Hughes.

A. I don't quite understand the question.

Q. I don't like to interrupt you for apparently he [226] wants you to answer fully. I am asking you if that two thousand dollars you paid to Mr. Turk's personal accounts was to give you a fifty per cent interest in the corporation to be formed; isn't that correct?

A. That was to pay——

Q. That was—I am sorry. Go ahead.

A. That was to pay him one-half interest for his assets including good will and I was to buy one-half which was two thousand dollars.

(Testimony of George N. Hughes.)

Q. And that was the accumulation—in other words, this figure of \$5414.68 is the total assets of the new corporation that was being formed at that time?

A. Less the liabilities; yes.

Q. And you gave Mr. Turk two thousand dollars that was not to be put into the corporation but for your share so that you would be equal owners of capital stock in the new corporation; isn't that correct?

A. That is right.

Q. Now, you made a very elaborate statement with reference to what was considered good will when the business was terminated between you and Mr. Turk when you bought his stock. You made a statement, as I remember, that you figured that over and above the book value that Mr. Turk wanted some extra payment for good will, isn't that correct, and you figured that was worth, to Mr. Turk, one-half of [227] the good will, of the profit on the inventory you had on hand on July 1, 1945; isn't that correct? 1944, I mean.

A. If I follow you correctly.

Q. Now, didn't the corporation pay for those units before July 1, 1944?

A. Yes; the corporation owned the units.

Q. And therefore when they were sold there was a profit to be derived from that; isn't that correct?

A. Yes; but they were not sold for nearly two years.

Q. There was still a profit to be derived from them?

A. To be, yes.

(Testimony of George N. Hughes.)

Q. With reference to the note you testified to for salary, who signed that note?

A. Mr. Turk as president and myself as secretary.

Q. Was that note completed when Mr. Turk signed it? Was it fully made out? A. Yes.

Q. It was fully made out and dated?

A. Yes; we signed the agreement. He was there.

Q. You say you think? I would like to know.

The Court: He said——

A. They were signed and executed.

The Court: Counsel is asking you, were there any blanks in the note to be filled in before it was signed by Mr. Turk? [228]

The Witness: No, no blanks.

Mr. Snow: Are you going to adjourn?

The Court: I want to finish with this witness.

Mr. Snow: I don't——

The Court: I can't see but very little more that you can ask him.

Mr. Snow: As far as I am concerned, I was through but I wanted to check with my associate counsel.

The Court: You may check.

The Witness: I think I could clarify what he is after, your Honor.

The Court: Do you have anything further?

Mr. Boldt: I am going to offer the other note made on the same day to Mr. Hughes. We don't have the one in escrow.

The Court: I don't think that is important.

(Testimony of George N. Hughes.)

Mr. Boldt: I don't either, but here it is.

Mr. Snow: I believe I am through with the recross.

Mr. Boldt: There isn't anything further, Mr. Hughes.

The Court: You may step down.

(Witness excused.)

The Court: The Court has some other matters, criminal cases, that will have to be given consideration at [229] two o'clock, so that I think I will adjourn this case until three o'clock and I might state to counsel that I will probably have to break into it again. I will give you an opportunity to go over into next week. I don't want to put it off until later on. There is a jury case set for next Tuesday, which I understand might be disposed of this afternoon on a plea, and if that happens we will not be crowded for time.

The issue has simplified itself down to whether he has use in Washington and Oregon alone or in the Western States.

Mr. Boldt: By "trade name" you mean "International Electric Fence Company"?

The Court: That is the only thing we are concerned with here. The corporation name has been adjudicated.

Mr. Snow: I haven't conceded, your Honor, that they have the right to use the word "International" anywhere.

The Court: Whether you conceded it or not—I can say nothing yet, I am not going to definitely

pass upon it—but if you will confine your testimony to that, I can see nothing that would bar them of the use of the corporation name. That was a matter involved in the State court.

Mr. Boldt: The corporation name is International Electric Fence Company. I am talking about the trade mark. [230]

Mr. Lyon: As I understand it, Counsel and Court mean that they haven't conceded anything in the joint use and the Court has suggested that there is an issue as to whether or not it might be exclusive only in the state of Washington and Oregon, or outside of the states of Washington and Oregon.

Mr. Snow: That is right.

The Court: There is the question whether the limitation of the corporation was to the States of Washington and Oregon and whether that might be exclusive or joint.

Mr. Boldt: That is right, and the further question——

The Court: That hasn't definitely been pleaded but it is in the case now because there is a certain amount of evidence—I don't say it establishes a fact—that the plaintiff as an individual continued to handle transactions outside the States of Washington and Oregon and shared a small portion of the profits with the corporation, of which he was half owner. There is no issue but that all sales made to the States of Washington and Oregon were made through the corporation to the benefit of

the corporation. So that raises in my mind at this stage the possibility of an exclusive right in these states as it existed during the days of the joint ownership of the corporation. The evidence [231] at this stage—I am not passing upon it—I am trying to make the issues a little clearer—so that we can reduce this testimony and get away from a great mass of material that won't be helpful in the disposition of the issues—indicates at this stage of the proceedings that Mr. Turk never completely surrendered the right that he had in this trade name in the states outside of the states of Washington and Oregon.

Mr. Snow: That is right.

The Court: But as to the States of Washington and Oregon, so far as the defendant's case, the evidence now indicates that that was business that went to the corporation and you still have the question of whether there was any reservation of that when the plaintiff stepped out of the corporate structure or picture.

Mr. Snow: I am just a little bit confused but I am going to ask the reporter if he will write that up so that I can study it.

The Court: I hope I make myself clear. At the opening of court this morning the Defendant conceded that he was not entitled to an exclusive use of the trade name in the Western States, which is a term sufficiently inclusive to include Washington and Oregon, but that he was entitled to a joint use of this trade name in these Western States,

and then when asked to enumerate what he meant by [232] Western States he said in those States in which he made a filing of the trade name, and so you have the question, first, was he entitled to the use of the name at all, and if so, was such use a joint use. Then, if he wasn't entitled to any use of the trade name in the territory that has been designated the Western States, is he entitled to a use of the trade name, either exclusively or jointly, in the States of Washington and Oregon, and whatever he is entitled to in the States of Washington and Oregon, which is part of the Western States is what the corporation is entitled to if there has not been a reservation of the trade name by the original owner.

Mr. Snow: That is correct.

The Court: Those are the issues.

Mr. Boldt: And, of course, the general issue of whether or not Turk is estopped to assert anything to the contrary now, irrespective of what the technical aspects of the matter might be. In other words, in spite of what the technical interpretation of the documents might be, there would be that further question of whether or not the conduct of a party, and their transactions together, because the only right——

The Court: That is a matter of argument on the facts.

Mr. Snow: Plaintiff hasn't put on his rebuttal witnesses. This is purely the Defendant's case.

The Court: Yes.

Court will be at recess, so far as this case is concerned, until three o'clock, but will be at recess until two o'clock for the purpose of other matters.

(Whereupon, at 12:15 o'clock p.m., January 14, 1949, a recess in this cause was had until 3:00 o'clock p.m., January 14, 1949.)

(Counsel heretofore noted being present, the following proceedings were had.)

The Court: You may proceed now.

Mr. Boldt: Mr. Hughes, just a couple of additional questions.

Further Redirect Examination

By Mr. Boldt:

Q. Mr. Hughes, has the International Electric Fence Company, at Vancouver, since its incorporation or prior to that time as far as you know, ever transacted any business outside of the United States? A. No; never.

Q. As far as you know has Mr. Turk, or either of his concerns, ever contacted any business outside of the United States.

A. Not as far as I know.

Q. Another thing—this device that we call a fencer was not a device particularly unique with your concern? [234]

A. Oh, no; there are many concerns that handle it.

Q. Pardon?

A. There are many concerns that handle it.

Q. That is the point I wanted the Court to un-

derstand. During all of the time that you were acquainted with Mr. Turk, from the first time you became acquainted with the type of device, have there been a considerable number of concerns manufacturing and distributing and selling devices similar to these devices?

A. Yes; quite a few. I don't know how many.

Q. Just to give the Court some idea——

The Court: I am not particularly interested. It is just like there are different refrigerators, radios, and other appliances?

The Witness: Yes, sir.

The Court: But are there any others carrying the label "International" on it?

The Witness: No. I assume not.

Q. (By Mr. Boldt): But the point is that the electric fence is a device that is manufactured by a large number of concerns and sold under a large number of names? A. That is correct.

Q. And has been ever since you have had any connections with the business even before the incorporation of [235] the Washington concern?

A. That is right.

Q. The "electric fence" is not a name that particularly designates this "International" product? A. No.

The Court: The Court understands that.

Mr. Boldt: I think that is all. I wanted the record to show that.

Mr. Snow: No cross-examination, your Honor.
(Witness excused.)

Mr. Boldt: That is all of our evidence, your Honor.

Mr. Snow: Shall we proceed now?

The Court: You may proceed.

Mr. Snow: Mr. Turk, will you take the stand?

RICHARD H. TURK

the Plaintiff, called as a witness for and on behalf of the Plaintiff, upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Snow:

Q. Will you please state your name, age, residence, and occupation?

A. R. H. Turk, 47 years old, and I am a manufacturer.

The Court: And you reside where; in Chicago?

The Witness: In Chicago.

Q. (By Mr. Snow): Are you connected with any manufacturing organization, Mr. Turk?

A. I am president of International Electric Company.

Mr. Snow: I am going to skip quite a bit, your Honor, because most of it has been stipulated to.

The Court: Yes. Much of which the Defendant testified to is not in serious dispute.

Q. (By Mr. Snow): Mr. Turk, was your concern—it is a little difficult for me to keep within the scope—does your firm ship electric fencers bearing the name “International” anywhere in the United States? A. Yes; we do. [237]

(Testimony of Richard H. Turk.)

Q. Where?

A. In practically all the states; almost every state in the Union.

Q. In almost every state of the United States. Do you have any foreign trade? A. Yes.

Q. Where do you ship; in what countries?

A. Oh, we ship to Venezuela, Colombia, South Africa, India and various places.

Q. Will you keep your voice up, Mr. Turk, please? Does all the equipment that you have shipped relate to fencers and fence controllers and similar items, Mr. Turk, and does all that equipment bear the trade mark "International" on the items?

A. All the items that we sell bear the trade mark "International." We have some items that are not electric fence items.

Q. What are those items?

A. Electric traps. We have a device called a code tooter electric heater, and that is all.

Q. Do these devices all bear the trade name "International"? A. They do.

Q. Are they shipped in Interstate Commerce throughout the United States? [238]

A. They are.

Q. Now, you sat through the testimony of Mr. Hughes and he made certain allegations. I wish you would, please, for the record of the Court, for the record and the Court, tell the Court what occurred in the summer of 1938?

(Testimony of Richard H. Turk.)

A. In 1938 I moved to Vancouver from Portland and I had previously started to manufacture fence controllers in Clark County and had hired Mr. Good and, perhaps, Mr. Good put out approximately five hundred fence controllers for me.

Q. Were you manufacturing, selling and shipping electric fencer units since 1938 when you were in Vancouver? A. Yes, I was.

The Court: I think we can save a lot of time if your witness will start and tell us the history in narrative form.

Mr. Snow: Thank you, your Honor.

Q. (By Mr. Snow): Do you understand that, Mr. Turk? A. Well, I——

The Court: I think you better go back farther. You came out west when?

The Witness: I have been—I am a Washington man, born here, in this State but I started selling fence controllers in 1936. [239]

The Court: And you were living where?

The Witness: In California at the time.

The Court: Very well; proceed.

The Witness: I sold my territory, my distribution, in California to Mr. Klint, who is in the court room, the same year and took the territory of Oregon and Washington for Richards Electric Fence Company of Fayette Idaho, and then the first of 1938, Mr. Soper, the sales manager for Richards Electric Fence Company, and I joined forces to sell a new type controller nationally and

(Testimony of Richard H. Turk.)

the units were not satisfactory and they cost us virtually all the money we had. When I moved to Vancouver I was five thousand dollars in the red on the deal.

The Court: That was in 1938.

The Witness: Mr. Soper was selling in the East and left without any merchandise to sell and for a period there of perhaps six months or a year I had various jobs and so on and was connected with a manufacturing plant and he asked me to allow him to manufacture the fence controllers.

Q. (By Mr. Snow): You better say where?

A. In Chicago and I agreed to that because I wished to devote my time to sales. At that time I covered Oregon, Washington, and California actively and I appointed Mr. Wyatt as a distributor for Idaho and part of Oregon. Incidentally, [240] on the date that, at the time that, Mr. Soper assumed the manufacture, I took back from Soper the exclusive sales rights for the twelve Western States. As a matter of fact, we never mentioned those States by name, just the twelve Western States, and that would take it over to some of the Central States. However, we did business under that agreement and my volume of sales under this arrangement was approximately ninety per cent of Soper's production at that time. We also, I might say, had an addition to that agreement that if the volume became great enough I would go back to Chicago and take an interest in the company and—

(Testimony of Richard H. Turk.)

The Court: Yes. Let's get along now. That was in 1938 and 1939 and the same thing in 1940?

The Witness: Yes. And in 1940 I hired Mr. Hughes to be my bookkeeper and repair man while I was on the road.

The Court: Had you known Mr. Hughes before?

The Witness: No, I hadn't known him. I knew of him. And then in October of 1941 Mr. Hughes proposed that—he propositioned me to take an interest in the concern. He volunteered to put up two thousand dollars for that purpose. Mr. Hughes stated on the stand a while ago——

The Court: Don't discuss what he said now.

The Witness: Well, anyway, there was no one after me from Portland and our accounts payable were paid up. As a matter of fact—— [241]

The Court: Well, you are skipping something there now. After you had Mr. Hughes in your employ about a year as a bookkeeper, he made you a proposition?

The Witness: Yes.

The Court: What was it?

The Witness: That he take—he help me out in part of that territory. I refused to give over any of the rights in that I did not turn over to him any rights.

The Court: That isn't very helpful. That is a matter for the Court to determine in the end. Mr. Hughes made you a proposition?

(Testimony of Richard H. Turk.)

The Witness: He offered to put two thousand dollars into a sales company to handle the sales of mine in Oregon and Washington and he never——

The Court: No, let's not go back to what he did or didn't do. He made you a proposition, evidently, to incorporate a business?

The Witness: That is right.

The Court: You had no concern. Before you were operating as an individual?

The Witness: Yes.

The Court: And when did the name "International" come into your individual operations?

The Witness: In 1938.

The Court: Mr. Soper wasn't using the name "International" [242] in his product except as you recommended it?

The Witness: Soper wasn't actively manufacturing in 1938. In 1939——

The Court: Who was making the product in 1938 that you were selling?

The Witness: I was. Mr. Good was making them for me.

The Court: And did you use the name "International" on it?

The Witness: Yes.

The Court: All right. Mr. Hughes made this suggestion about a corporation. What was the outcome of that?

The Witness: He supplied two thousand dollars for a half interest in the sales corporation, limited

(Testimony of Richard H. Turk.)

in sales to Oregon and Washington. No rights in the trade name were transmitted to that corporation.

The Court: What I am interested in was what he said and what you said and what was done.

The Witness: Well, Mr. Hughes handled——

The Court: No. When he made you this proposition, you eventually agreed and articles of incorporation were drawn?

The Witness: Yes.

The Court: Did you go to a lawyer that he selected or that you selected? [243]

The Witness: Mr. Hughes selected the lawyer. I was on the road at the time and I left it in Mr. Hughes' hands and the papers were all drawn up and I never even read them. I signed just like you will when there is a whole group of papers.

The Court: But at any rate——

The Witness: I reserved——

The Court: ——you were transacting business and he was your bookkeeper and when did his status change from being your bookkeeper to an officer of the corporation?

The Witness: In October, 1941.

The Court: Is that when the articles of incorporation——

The Witness: October 9, 1941. At that time I had no right to the trade name. I transferred that to Mr. Soper in 1939 when he took over the manufacturing and I took over the exclusive sales rights

(Testimony of Richard H. Turk.)

which was drawn up a year before Mr. Hughes and I had any trouble.

The Court: Then when this corporation was set up it was set up with how much stock?

The Witness: Four hundred shares at ten dollars value.

The Court: Four thousand dollars capital value?

The Witness: Yes, sir.

The Court: Was it all subscribed for? [244]

The Witness: It was all subscribed for. I know that the business had been very profitable.

The Court: I want you to stay away from your conclusions. On this stock subscription——

The Witness: Yes.

The Court: ——did Mr. Hughes put in two thousand dollars in cash?

The Witness: He did.

The Court: And then what did you subscribe to?

The Witness: I supplied the inventory on hand and the accounts receivable and that is all.

The Court: And how much were those? Did you itemize them?

The Witness: I would judge about some place in the neighborhood of five thousand dollars worth. A good deal more than——

The Court: And what became of the two thousand dollars that Hughes put in?

The Witness: That was cash.

The Court: Who got it?

The Witness: I imagine I got that as an indi-

(Testimony of Richard H. Turk.)

vidual. I know that I paid the accounts payable that were due with that money, most of which went to Mr. Soper.

The Court: You started out as equal shareholders in this new corporation? [245]

The Witness: That is right.

The Court: And you say there was about five thousand dollars in asset?

The Witness: I believe there were. I haven't the figures here.

The Court: Were those net assets or some liabilities?

The Witness: Some, yes.

The Court: Were there enough liabilities to cut it down to four thousand dollars?

The Witness: Possibly there were.

The Court: You heard Mr. Hughes' testimony, that they estimated the net assets were four thousand dollars and that was equal to your capital stock and you were turning that in and he put in two thousand dollars which went to you personally and it made each of you have two thousand dollars invested. Is that correct?

The Witness: I think that that part is correct; yes.

The Court: Then what followed next? What, if anything, was said about the matter actually in controversy here? What about the sales territory?

The Witness: I reserved the sales in practically—in parts of Oregon and Washington I had already

(Testimony of Richard H. Turk.)

appointed Mr. Wyatt and had given him territory in Oregon and Washington. [246] I reserved that territory for Mr. Wyatt and myself, and California and all the other states for myself, and that is——

The Court: I am not caring about that. Your counsel will argue that. But, what did the corporation have to do with this so-called reserve territory? The Vancouver corporation?

The Witness: The Vancouver corporation had nothing to do with that. I allowed the corporation a small percentage in exchange for looking after—the checks would come in and be made out to the corporation. To get an idea of——

The Court: I don't care for those details. You admit that a certain part of the outside sales went to the corporation?

The Witness: Yes.

The Court: And went to cover the expenses of handling?

The Witness: Yes.

The Court: What were your duties and obligations towards the corporation and what were Mr. Hughes?

The Witness: I was president and Mr. Hughes was secretary. I was the field man and he was the office man.

The Court: And all the orders you got, irrespective of what state, they were to send them to the corporation? [247]

The Witness: Well, I delivered a large part of

(Testimony of Richard H. Turk.)

my orders. You see, at that time my travelling was limited to Oregon and Washington. I did not make any sales in either Idaho or California.

The Court: Well, but the Idaho and California sales were being made.

The Witness: And I was getting the money from them.

The Court: Where did the fellows write when they wanted one or one hundred of these units?

The Witness: They would write to the firm I designated to look after it for me.

The Court: Well——

The Witness: International Electric Company.

The Court: I have read Mr. Soper's deposition here and this so-called firm was Mr. Soper until you got into it as a partner. So they didn't order through you at all. They would order direct from Soper?

The Witness: No. No. The order would come to Vancouver, which was looking after it for me. I was on the road most of the time selling in Oregon and Washington and on that Oregon and Washington business I got ten per cent commission which covered my expenses as a salesman and, of course, in Idaho and California I had no expenses because I [248] did no travelling and I got twenty per cent commission, which was all of the income outside of the expenses.

The Court: Now, this relationship went along through 1941, was it?

(Testimony of Richard H. Turk.)

The Witness: 1941. In 1942——

The Court: Fall of 1941?

The Witness: Yes, to the first of June, 1943.

The Court: To the first of June, 1943?

The Witness: Yes.

The Court: Were there any difficulties then in the handling of the business between Hughes and yourself?

The Witness: No, no difficulties whatever.

The Court: The corporation was prospering, was it?

The Witness: Yes. My income from the corporation was \$15,400 net in 1943.

The Court: And Mr. Hughes' was the same?

The Witness: Yes; practically.

The Court: And did that include your two hundred dollars a month?

The Witness: My salary was one thousand dollars a month and Mr. Hughes' salary was one thousand dollars a month.

The Court: Was that on top——

The Witness: Of the commission. [249]

The Court: Well, the commission was yours, but was that on top of the dividends that the corporation declared? Was that in dividends or salary, salaries and commissions?

The Witness: There were no dividends as such until the dissolution of the money—my interest.

The Court: All right.

(Testimony of Richard H. Turk.)

The Witness: In 1943 I was in the East from then on.

The Court: That is when you formed the new relationship with Soper?

The Witness: Yes, and I continued to draw my commissions from Idaho and California, although I hadn't seen those people or hadn't put a lick of work in.

The Court: Now, had there been any discussion between Hughes and yourself about the trade name?

The Witness: None at all.

The Court: And when did that first come into the picture here?

The Witness: The question of trade name did not come into the picture until after I sold my stock. I sold my stock to Mr. Hughes. That was not discussed at the time of transfer.

The Court: All right. Is there something then you want to say now? What was the question of the trade [250] name as it came into the picture? How did it come in? In writing or anything else?

The Witness: Well, Mr. Hughes after—well, I imagine about October, 1944—

The Court: Some five or six months after you sold the stock?

The Witness: Some three or four months.

The Court: Very well.

The Witness: He asserted the right to the trade name and right after he purchased my stock I stated he did not have a right to the trade name and was limited in territory.

(Testimony of Richard H. Turk.)

The Court: Did that come in before the sale or at the time of the sale?

The Witness: He has offered to buy my stock previously and he said that if he did he wanted to get the trade name rights with it.

The Court: And that was before the deal was consummated, was it?

The Witness: That is right.

The Court: And then what happened?

The Witness: Well, I didn't make a deal on that basis.

The Court: Well, let me ask you, did it deal with the States of Oregon and Washington or all the Western states [251] or what?

The Witness: Only with the states of Oregon and Washington.

The Court: In which he would be given the trade name?

The Witness: Yes.

The Court: Did he talk about exclusive use or joint use with you in your operation in the East?

The Witness: Only in one letter was it mentioned.

The Court: Those letters were subsequent to the sale, but what I am trying to get it what, if anything, was said before the sale of the stock.

The Witness: You mean at the time of the sale of the stock?

The Court: Before. I understood you said before Hughes said he wanted this trade——

(Testimony of Richard H. Turk.)

The Witness: At first he wanted to buy—he wanted to put one thousand and two thousand dollars into—he wanted to increase the capital stock and wanted to buy the extra stock. He mentioned that a dozen different times and I didn't want to sell.

The Court: Were those letters written before the sale of the stock?

The Witness: Yes, before. [252]

The Court: Very well.

The Witness: And I didn't want to sell. In fact, in June of 1944 I told him that I didn't want to sell that he could buy after the war, if it was necessary at that time. That was after I had purchased Mr. Soper's interest in International Electric Company. At the time that the sale of stock was consumated——

The Court: That was in 1944, July, 1944?

The Witness: Yes. There was no discussion about trade name. I didn't have——

The Court: What I am trying to get is, was there any discussion before at all, either by letter or orally, or otherwise?

The Witness: Yes. Yes, there was.

The Court: More than one discussion?

The Witness: Several letters.

The Court: Were they letters or any personal discussion or——

The Witness: Letters, I would say. Mr. Hughes wanted to buy my stock earlier, in, I think, it was May, and at that time he said that I would——

(Testimony of Richard H. Turk.)

The Court: That is May, 1944?

The Witness: Yes.

The Court: I don't care for all the details but I wanted—— [253]

The Witness: Well, what he offered me was he would see that I continued to draw my income from the corporation. It would be his——

The Court: That is, you would keep getting one thousand dollars a month?

The Witness: Yes. In other words, he would buy all of his merchandise from me at a higher price——

The Court: And pay you a salary of one thousand dollars a month?

The Witness: No. No salary. That was in lieu of the fifteen thousand dollars a month—fifteen thousand dollars a year—I was getting. In 1944, at the first of July, our sales were sixty-five thousand dollars.

The Court: I wish you would stay with the May deal. He offered to buy this and pay you a commission on all the things furnished out here?

The Witness: Yes.

The Court: And what did you do, accept or reject that offer?

The Witness: Well, that was the basis for the acceptance when it was accepted. In other words, he didn't have any trade rights, he wanted a sales franchise under me for the States of Oregon and Washington, the same as Mr. Klint had, and the same as Mr. Wyatt had.

(Testimony of Richard H. Turk.)

The Court: That is what he said in the letter?

The Witness: That is what he said in the letter.

The Court: And——

The Witness: And that was the deal. He did not acquire any rights to the trade name.

The Court: I don't want your conclusion. We wouldn't have this law suit if your conclusion determined it. I have got to make that decision. Just the facts. He made you an offer to buy your stock that you had at that time. You had acquired back from Mr. Soper the fifty per cent of your stock?

The Witness: That is right.

The Court: And he told you that he didn't want any rights under the trade name, or did you just understand that?

The Witness: He would be on the same basis as Mr. Wyatt and Mr. Klint; that they had.

The Court: He said it in a letter, did he?

The Witness: Yes; he did.

The Court: Do you have that letter?

The Witness: I have his letter after that too.

The Court: Do you have that letter?

The Witness: Yes, I do. It is in evidence.

The Court: It is in evidence?

The Witness: It is in evidence.

The Court: I want you to pick it out for me.

Mr. Snow: If I may—he has made extracts from these letters.

The Court: I don't think extracts——

Mr. Snow: Just for the purpose of getting the dates.

(Testimony of Richard H. Turk.)

The Court: I wish you would go right along now.

The Witness: After the sale of stock Mr. Hughes wrote me and stated——

The Court: Is that in connection with the stock sale? Did you come out here for the stock transaction?

The Witness: Yes; I did.

The Court: Had you been out shortly before that?

The Witness: Approximately one month earlier.

The Court: When you were out a month earlier, did you fix the terms to which he agreed or what?

The Witness: Oh, there was no discussion of a sale of stock in May when I was out here.

The Court: Then you were out in June also?

The Witness: I flew out. Probably I was here one day, the first of July.

The Court: That is when you closed the deal?

The Witness: Yes.

The Court: Had you completed your negotiations as far as terms were concerned?

The Witness: Yes, we touched—we knew approximately [256] from the correspondence what the deal would consist of and I talked to Mr. Hughes and he had the papers all ready and we sat in the truck and completed the deal verbally.

The Court: These exhibits that show certain figures are the ones that were submitted to you and that you talked over in the truck?

(Testimony of Richard H. Turk.)

The Witness: Yes.

The Court: Well, what were you selling to him, two hundred share of stock?

The Witness: Yes.

The Court: And you were taking the book value?

The Witness: The book value and his assurance that he would continue to buy all of his merchandise from me and at a stated price which was fifty per cent of the list price and that, of course, was a verbal contract.

The Court: Yes?

The Witness: And also there was 3146 controllers on hand and obviously those controllers until they were sold, that part of the deal, that 33 and $\frac{1}{3}$ per cent increase, could not go into effect and he would not be buying any merchandise from me.

The Court: But the actual cost was figured into these calculations whereby you got your 23 thousand dollars, or whatever it was. [257]

The Witness: My total—I got fifty per cent of the net worth of the corporation, plus——

The Court: Did that include these three thousand?

The Witness: Yes.

The Court: At the price that the corporation had been paying?

The Witness: Yes, and the price they had been buying for was seven-fifty.

(Testimony of Richard H. Turk.)

The Court: Up to this point, what discussion was there of the territory and of the trade name?

The Witness: Well, his territory——

The Court: What was the discussion? Not what you think you were giving him but what he said and what you said. Give the substance of it.

The Witness: Well, he said he would carry on the business as it had been carried on. Other discussions than that I wouldn't—it was five years ago.

The Court: The business hasn't been carried on on a thirty-three and a *half* per cent increase?

The Witness: No. He agreed to give that in addition. That was to compensate me for the salary which I had drawn up until that time and wouldn't be able to draw in the future.

The Court: What was said about the trade name?

The Witness: It was not mentioned. [258]

The Court: What was said about Mr. Hughes' buying a product from some other manufacturer and using the trade name on it ?

The Witness: That was not mentioned. I didn't attempt to bind him. I knew that if he had sold other merchandise that I would, that I could, cancel his right to sell International and that is the only thing of any value.

The Court: How did you know that?

The Witness: Because I had the exclusive right of the trade mark.

The Court: But you were selling your half interest in the corporation.

(Testimony of Richard H. Turk.)

The Witness: No. The corporation had no right to the trade mark.

The Court: How did you know that?

The Witness: Because it did not receive any right to the trade mark at the time of its formation.

The Court: Well then, we get down to a question of law—of fact. You signed the articles as president?

The Witness: Yes, I did.

The Court: And those recited that it would receive the good will that you had as an individual?

The Witness: I reserved the right to the——

The Court: Of course you didn't in that document.

The Witness: Now, of course, I had no right to the [259] trade mark at the time that the corporation was formed. I had already transferred that right to Mr. Soper in 1939. Mr. Hughes knew I had no right. It was not discussed. He knew that the corporation had no right. He stated so after he purchased my stock that the corporation had no right.

The Court: Let's not argue. I don't want you to argue. You have able counsel. I want to know what the facts are. If he said that neither the corporation, nor you, nor he had any right to the trade name, then I would like to have you, if you can recall, give the conversation that took place.

The Witness: Twenty-four days after he purchased my stock he wrote to me complaining be-

(Testimony of Richard H. Turk.)

cause I had not transferred to him the trade mark and that he was still limited.

The Court: Do you know what prompted him to do that?

Mr. Boldt: If your Honor please, there is no letter to that effect in evidence.

Mr. Snow: Yes, there is. Exhibit 15.

The Court: Yes, but I would like to have the witness answer the last question. Do you know what prompted him to write, twenty-four days after transfer, and complain that you had not yet transferred the trade name?

The Witness: I figured he had my stock in his possession and he wished to renege on the deal.

The Court: What did you respond?

The Witness: I refused to consider his application for——

The Court: Well, in substance did you just write to him and say “I will refuse to give you the trade name”?

The Witness: Yes, without putting it in those words.

The Court: But that was the substance?

The Witness: That is right. Five months after I sold him he stated that all that Turk had was the trade mark.

Mr. Boldt: These are purporting to be quotations from letters?

Mr. Snow: We will be glad to hand them to the witness and let him pick them out.

(Testimony of Richard H. Turk.)

The Court: I would like to have him go ahead, and he can refer to the letters, but I want him to give me his version of this controversy.

The Witness: Well, Mr. Hughes never objected

The Court: No. That is negative. What I want to know is, you say one month after the deal was closed he said, "Why don't you transfer the trade name"—did he say in what territory or what part of it?

The Witness: Oregon and Washington. [261]

The Court: And then five months later he complained again. Was that for the Western states?

The Witness: No, he wanted the right to Oregon and Washington. He stated that I owned the trade mark.

The Court: That you owned it?

The Witness: Yes.

The Court: I thought you said that he wasn't getting it, as if he understood he would get it.

The Witness: I didn't understand that he was going to get it. He was objecting because he had not gotten it.

The Court: Let me interrogate you on another point. When was this word "International" first brought into the picture in connection with these devices, to your knowledge?

The Witness: Approximately January of 1938.

The Court: Approximately January, 1938. Were you operating in Portland then?

The Witness: Yes.

(Testimony of Richard H. Turk.)

The Court: And you had a corporation?

The Witness: Yes.

The Court: Did you have the name "International" in your corporation there?

The Witness: We did.

The Court: What did you call the Oregon corporation? [262]

The Witness: International Electric Fence Company.

The Court: And is that the first time that the name "International" had come into the picture?

The Witness: Yes.

The Court: And was it your own thought?

The Witness: I just thought the name was good. Mr. Soper and I decided it.

The Court: He was not out here.

The Witness: He was here.

The Court: In Portland?

The Witness: In 1938.

The Court: Were you operating as partners before you started the corporation?

The Witness: No.

The Court: Did you buy stock in the Oregon corporation?

The Witness: He and I were both in it.

The Court: Equal stock holders?

The Witness: Yes.

The Court: And when you incorporated you decided that you would use the word "International"?

The Witness: Yes.

(Testimony of Richard H. Turk.)

The Court: Whose thought was that, yours or Soper's?

The Witness: To use the name "International"?

The Court: Yes.

The Witness: I think it was my choice of the name, although——

The Court: And then when did you convey and in what manner this trade name to Soper?

The Witness: In 1939 when Soper became the manager and I became just a distributor.

The Court: Was there some written conveyance?

The Witness: In correspondence.

The Court: But you made no formal conveyance?

The Witness: No.

The Court: What happened to the stock, your stock and his stock?

The Witness: The Oregon corporation lapsed.

The Court: And you both lost the stock?

The Witness: We both lost the stock.

The Court: And you thought in 1939 that Soper was the owner of the trade name?

The Witness: Yes.

The Court: And there had been no effort then to register it?

The Witness: No.

The Court: When did Soper convey it to you?

The Witness: June 1, 1944.

The Court: Was there a formal conveyance of any kind?

(Testimony of Richard H. Turk.)

The Witness: The transfer of the interest, of his interest, in the partnership of Turk and Soper.

The Court: You mean you had a partnership with him and dissolved that partnership?

The Witness: Yes.

The Court: That was the Chicago venture?

The Witness: Yes, and I inherited it.

The Court: Do you have some papers of the dissolution of that partnership?

The Witness: Yes.

The Court: Do you have them with you?

The Witness: I don't have them with me.

The Court: Do they recite that the trade name "International" is his asset and that you are to be the owner of it?

The Witness: It is not specifically mentioned.

The Court: The trade name wasn't mentioned?

The Witness: The trade name wasn't mentioned.

The Court: When did you first come to a realization or feel that you knew that the trade name was an asset?

The Witness: Well, when I bought Mr. Soper's—

The Court: Not until that time, until 1944?

The Witness: I bought Mr. Soper's interest. I paid him a large price largely because I wanted the trade name. I thought I could build on that.

The Court: When you bought him out as a partner?

The Witness: Yes. I gave him my stock in Electric Service Systems which physically was worth a great deal more.

(Testimony of Richard H. Turk.)

The Court: You and he had been in partnership about a year and a half?

The Witness: Just one year exactly.

The Court: And the trade name wasn't mentioned at that time when you entered into the partnership?

The Witness: No; it was not mentioned.

The Court: Was it at that time that you gave him fifty per cent of your stock in the Vancouver corporation?

The Witness: Yes.

The Court: That was in 1943?

The Witness: 1943, June 1st.

The Court: That was a partnership set up?

The Witness: Yes.

The Court: And no mention was made of the trade name then?

The Witness: No: Well, we had a partnership agreement drawn up and it is in evidence. I don't know—— [266]

Mr. Snow: It doesn't mention it, your Honor. It is here.

The Court: Well, this thought of yours, when you and Soper first went into business in Portland, that the word "International" on these products would be your trade name later developed into a situation where you concluded it was a thing of value?

The Witness: We had built it into a thing of value.

(Testimony of Richard H. Turk.)

The Court: When was that? Before you went to Chicago or after?

The Witness: It had become a thing of value as early as 1941. The unit we had was very good in comparison with other fence controllers and I had greatly increased my outlets in these Western states. My rate of growth was very rapid. In a short term of three years my net worth——

The Court: Who owned the trade name in 1941?

The Witness: Mr. Soper.

The Court: Well, why were you building up a trade name if you had no interest in it?

The Witness: I was building up a sales outlet. I made more money than Mr. Soper did.

The Court: But you had no interest in the trade name in 1941.

The Witness: No. I transferred that in 1939.

The Court: Do you have any documentary evidence?

The Witness: It was in letters, letters of 1939, they were out on my farm and they have been destroyed along with——

The Court: So far as Soper is concerned, he makes this unit and you could put any kind of a trade name on it, couldn't you?

The Witness: That is right.

The Court: And you could sell it to anybody? And he could sell it to anybody?

The Witness: That is right.

The Court: I think I have covered what I had

(Testimony of Richard H. Turk.)

in mind. I didn't mean to take it away from you, Mr. Snow.

Mr. Snow: You did a very good job and saved a lot of time, I believe.

Q. (By Mr. Snow): Mr. Turk, when his Honor questioned you with reference to the assets of the business, R. H. Turk doing business as International Electric Fence Company, at the time you entered into a partnership, or entered into this corporate set up with Mr. Hughes, you said that he paid you two thousand dollars, and that the net worth of the company was around four thousand, I believe you said. Did that net worth, to your knowledge and belief, include any liabilities of your business? [268]

A. That would include the liabilities.

Q. That would include the liabilities. What happened to that two thousand dollars that you got, Mr. Turk?

A. Well, my recollection is that most of it anyway was sent to Mr. Soper.

Q. Why?

A. To expedite the delivery of more merchandise.

Q. Was that for new merchandise or payment for old merchandise?

A. As my memory goes, it was a part payment on the account and a part in advance.

Q. There was some accounts payable at the time

(Testimony of Richard H. Turk.)

that four thousand dollars was taken as a figure of value for your business, is that correct?

A. Yes, I believe that is correct.

Q. And the accounts payable were considered when that figure was arrived at? A. Yes.

Q. And you paid those accounts payable, which included an amount to Mr. Soper for fencers that you had purchased prior to October 9, 1941, with that two thousand dollars; is that correct?

A. I believe it is; yes.

Q. Mr. Turk, why could you not give Mr. Hughes any [269] trade mark rights when—start that over again and strike it.

The Court: I don't want to go over that ground again. His contention is that he couldn't transfer anything to the corporation because he didn't own it and that Soper owned it. That is his contention and that when he sold the stock in the corporation later, in 1944, he was the owner of the trade mark.

Mr. Snow: Thank you.

The Court: Is that correct?

The Witness: What was that?

The Court: In 1944 when you sold out—

The Witness: I had it; yes.

Mr. Boldt: He had it thirty days before.

The Court: A month before. All right.

Q. (By Mr. Snow): Mr. Turk, of your own knowledge, do you know whether or not Mr. Hughes and the Washington corporation sells, if they sell, merchandise relating to fencers and units in the eastern part of the United States?

(Testimony of Richard H. Turk.)

A. Yes; I have seen units that Mr. Hughes sold in North Carolina and I understand that he sold quite a few in Virginia.

Q. Why did you come to that conclusion? Did you see it of your own account or talk to somebody?

A. My distributor in Virginia was greatly concerned because these units had shown up in his area and they were selling at a much lower price than he was selling for and I had to go there and find out about it.

Q. Do you know what time this was?

A. This was about two years ago. Greensborough, North Carolina, and he drove me up——

The Court: I don't care for the details.

Q. (By Mr. Snow): Did you see the units there?

A. Yes. And found out where they came from.

Mr. Snow: Will the Clerk please mark a letter dated September 16, 1944, written on the International Electric Fence Company letterhead, and signed George N. Hughes, for identification as Plaintiff's Exhibits——

The Clerk: Plaintiff's Exhibit 23 marked for identification.

(Document referred to marked Plaintiff's Exhibit Number 23 for identification.)

Q. (By Mr. Snow): Mr. Turk, I hand you Plaintiff's Exhibit 23, so marked for identification, and ask you if you can identify that letter?

A. Why, I received this letter from Mr. Hughes.

(Testimony of Richard H. Turk.)

Q. You received that letter from Mr. Hughes about [271] that date? A. Yes.

Q. Will you please read——

Mr. Snow: I am sorry. Counsel, I offer that letter in evidence as Plaintiff's Exhibit 23.

Mr. Boldt: No objection.

The Court: Very well. It will be received.

(Plaintiff's Exhibit Number 23 for identification received in evidence.)

PLAINTIFF'S EXHIBIT NO. 23

[Letterhead] International Electric Fence Co.

Vancouver, Washington

September 16, 1944.

Mr. R. H. Turk,

International Electric Fence Co.

910 West Van Buren St.

Chicago, Ill.

Dear Mr. Turk:

Inclosed herewith is the escrow agreement relative to the note given in settlement of your open account of accumulated salary, the terms of which were agreed upon between us on the occasion of your last visit in Vancouver. I believe everything contained in the agreement is self explanatory, unless it be expiration date, which is Mar. 15, 1950. This date was advised by my attorney, giving as his reason that the five year period would not expire until the time for filing the report of income for 1949, which would be the following March 15th.

(Testimony of Richard H. Turk.)

In the event you find the inclosure to be satisfactory please sign at the appropriate place and return and we will execute them here, leave one with the bank along with the note and return one copy to you for your files.

Yours very truly,

INTERNATIONAL ELECTRIC
FENCE CO.,

By /s/ G. N. HUGHES.

Admitted Jan. 14, 1949.

Q. (By Mr. Snow): Will you please read a quotation from that letter indicating that Mr. Hughes admitted that the note that was given at the termination of the partnership—or the corporation—when you sold him this stock had not been completely executed at the time when he said it was? A. Yes. This letter states—

Mr. Boldt: Well, whatever it states—read it.

A. (Continuing) “I believe everything contained in the agreement is self-explanatory, unless it be expiration date, which is March 15, 1950. This date was advised by my attorney, giving as his reason that the five year period would not expire until the time for filing the report . . . for 1949.”

Q. At the time when you signed the note referred to therein, was the note completely filled out and completed when you signed it? [272]

A. The note was in blank. All that appeared on it was Mr. Hughes' signature and my own signature, my own marking.

(Testimony of Richard H. Turk.)

Q. Were there two notes or one?

A. Two notes.

Q. Were both the notes in the same condition?

A. Yes.

Q. When was that? A. July 1, 1944.

Q. Did at any time, either prior to or subsequent to the date of July 1, 1944, Mr. Hughes ever attempt to buy the business in Chicago from you or Mr. Soper or both?

A. After July 1, 1944, he tried to buy the Chicago company, in order to get the trade name, the trade mark.

Q. Now there was some discussion on the stand about a thirteen thousand dollar transaction when Mr. Hughes was on the stand. Will you please explain that to the Court?

A. To try to equalize taxation as much as possible we made a book entry of a charge of approximately thirteen thousand dollars.

Q. Who was "we" and the date, please?

A. The Chicago factory charged the Washington corporation thirteen thousand dollars. This was just a book entry and that was later cancelled some time in June because it was found to be unnecessary. [273]

Q. In June of what year? A. 1944.

Q. So that Mr. Hughes never paid that thirteen thousand dollars, did he?

A. No. He paid none of it.

(Testimony of Richard H. Turk.)

The Court: You mean by that that you never got anything for your two hundred shares of stock?

Mr. Boldt: This is another matter entirely.

The Witness: Mr. Hughes stated we overcharged him thirteen thousand dollars.

The Court: Let's stay away from those things.

Mr. Snow: I am trying to stay away from the unfair competition but I had to combat the statement made earlier.

The Court: I am not so much interested in the unfair competition as in the use of the trade name; what the Plaintiff here did to protect himself. That is the narrow issue.

Q. (By Mr. Snow): Mr. Turk, when was the first time that you believed that you ought to protect that name "International" and what did you do about it?

A. When I received in the mail invoices from Mr. Soper to Mr. Hughes indicating that Mr. Soper was manufacturing for Mr. Hughes material with the name "International [274] Electric" as a trade mark.

The Court: That was what year?

The Witness: That was in 1944 after Mr. Hughes had purchased my stock.

Q. (By Mr. Snow): Can you tell the Court approximately what month that was, Mr. Turk?

A. Well, it was—I don't know that.

Q. You don't know that? Thank you. What did you do?

(Testimony of Richard H. Turk.)

A. I contacted Mr. Fee, a Chicago patent attorney, and asked him to file an application for a trade mark in the United States Patent Office.

Q. Did he prepare such a trade mark application and file it?

A. He prepared it and it wasn't filed until much later, probably a year later, due to a misunderstanding.

Q. What was that misunderstanding?

A. He thought I hadn't paid him for the work and it developed that I had when he sent me a bill. I thought it was already filed and it hadn't been.

Q. Did you sign that application some time prior to the actual date that it was filed in the United States Patent Office?

A. Yes; I would say a year earlier than it was filed. [275]

Q. You didn't ask Mr. Fee to hold up the filing of that application, did you, Mr. Turk?

A. No. I didn't know it was held up.

Mr. Snow: Your witness, Mr. Boldt.

Your Honor, if I may please, before Mr. Boldt proceeds with this witness, ask the Court's permission to take the testimony of Mr. Klint who is up here from Fresno, California, having been here since Wednesday and his testimony is very short and relates only to unfair competition matters.

The Court: Well, you may step down and Mr. Klint may take the stand. [276]

CHARLES KLINT

called for and on behalf of the Plaintiff, upon being first duly sworn, testified as follows:

Direct Examination

By Mr. Snow:

Q. Will you please state your name, age, residence and occupation?

A. Charles Klint, age 59, resident Fresno, California. I am a distributor for various manufacturers, including International Electric Fence Company.

Q. When did you begin selling International Electric Fence Company equipment, Mr. Klint?

A. In 1940.

Q. In 1940? A. Yes.

Q. How did you happen to sell their equipment?

A. Mr. Turk, whom I had known for several years, stopped in and offered us the distributorship for the State of California at that time.

Q. Are you familiar with the—strike that. You say he offered you a distributorship at that time, and that was 1940? A. Yes.

Q. Did you accept that distributorship?

A. Yes. [277]

Q. Do you still retain that distributorship?

A. Yes.

Q. Have you always retained it since 1940?

A. Yes.

Q. Are you familiar with the working arrangements of the Model Number 106, which is manu-

(Testimony of Charles Klint.)

factured by the International Electric Fence Company? A. Yes.

Q. Are you familiar with the Model 106?

A. Yes.

Q. I am sorry. Is there a model, a similar model, put out by Mr. Hughes of the International Electric Fence Corporation of Washington?

A. Yes.

Q. What number does he give that unit?

A. 106.

Q. The same number as Mr. Turk's model?

A. Yes.

Q. Are you familiar with the working parts of this construction? A. Yes.

Q. Are you familiar with the working parts of Mr. Hughes' construction? A. Yes.

Q. Are the parts interchangeable? [278]

A. Practically, yes.

Mr. Boldt: What is that?

Mr. Snow: Practically, yes.

The Witness: Practically, yes.

Q. (By Mr. Snow): Mr. Klint, have you ever heard of Mr. Hughes, the Defendant in this case, and International Electric Fence Company, a Washington corporation? A. Yes, I have.

Q. Have you ever run across any of their salesmen or distributors or dealers or jobbers in the State of California in your territory or elsewhere?

A. Yes. One of them at least has called in our office; and others we have run into through contact with our dealers.

(Testimony of Charles Klint.)

Mr. Snow: I ask that this circular, headed "International" and alleged to be put out by "International Electric Fence Company, Inc., Vancouver, Washington" be marked as Plaintiff's Exhibit——

The Clerk: Plaintiff's Exhibit 24 marked for identification.

(Document referred to marked Plaintiff's Exhibit Number 24 for identification.)

PLAINTIFF'S EXHIBIT NO. 24

INTERNATIONAL

1. Extra High Voltage with Low Amperage.
2. Fence Charged At All Times (makes it most effective unit on market).
3. No Moving Parts. Nothing to get out of adjustment, operates in any position.
4. No Radio Interference.
5. Automatic Voltage Regulation For Wet or Dry Ground.
6. Clear Light indicates operating properly. Red Light indicates a short somewhere.
7. Safe—Dependable—Guaranteed — Approved —Insured.
8. 2 Oil Filled High Voltage Hermetically Sealed Replaceable Condensers. Transformer has Isolated Windings and Extra Insolation providing Maximum Safety.
9. Housed In Heavy Gauge Steel Cabinet Painted A Beautiful Bright Blue with Chrome Fittings.
10. Parts That May Wear Out Can Be Replaced Without Use of Tools.

(Testimony of Charles Klint.)

Model 44D 110 to 120 Volt A. C.

Shipping Weight 7 lbs.

This well balanced International controller will give higher voltage than any other unit of this type. It undoubtedly is the most effective low amperage controller on the market.

The principle of operation lies in having a built up charge on the fence at all times. This charge is dormant until the fence is touched by the animal which unloads the fence and the condenser in the controller of its stored up charge. The charge is built up from a condenser input of but 7 milliamperes which is the maximum continuous output under any condition. Having no moving parts there is no radio interference and there is no wear or getting out of adjustment. The output on the fence is in the form of Direct Current and embodies all the benefits of the greater safety of this type of electricity. Cost 5c to 10c per month to operate.

Other units may have higher voltage when measured without any fence load but even a relatively short fence may result in dropping the fence voltage fully 90% where the on period is of the short impulse type. Not only is the voltage greatly reduced but the amperage is also less due to the amount of electricity needed to recharge the wire during each shock period. That such a unit may be partially successful must be admitted but it does not begin to compare with the International Model 44D which Maintains A Fully Charged Fence Until

(Testimony of Charles Klint.)

the Animal Touches it. There is no Getting Part Way Through the Fence while the current is off—It Is Always Right There—Waiting.

The International Model 44D was developed for the rancher who wants and needs a unit with superior shocking power and yet wishes to use only a safe and dependable device. This International controller is ideal for the tougher assignments and for the customer that wants something with considerably more kick than anything he has seen yet, without sacrificing safety. Stock have more respect for the electric fence when the charge put forth by the fence is an instantaneous hard hitting high voltage wallop that hurts.

The parts most likely to give out are replaceable without the use of tools or loss of time and without the bother of sending the sealed unit back to the manufacturer for servicing. This accessibility is quite an advantage as any dealer in electric fencing can well appreciate. No farmer wants to do without his fence for a week or two and the dealer also wishes to avoid service calls as much as possible.

The International Model 44D is constructed to comply with safety regulations. It is also Oregon approved and is fully guaranteed and insured.

(Testimony of Charles Klint.)

Call or write us today for information on the International, the most up to date and modern fencer on the market.

For Superior Performance at Low Cost
Buy International

International Electric Fence Co., Inc.
2215 Main Street Phone 1265
Vancouver, Washington

[Notation on reverse side of Exhibit 24 (circular).]

This party sold one 106 and one 500 control to party I called on. Are telling buyers that Charles Klint & Co. are imposters and are not selling the original International. So far I have only found this case at Atescadero, but probably may find others likewise on my way. Would like to meet this guy I bet he would not sell Fencers for some time. I am not worried in the least as I can handle the situation very nicely and out sell the S.B. at that besides putting a crimp in his future business, if any.

Yours,
/s/ A. B. THOMAS.

P.S. Am not through here yet, more orders will arrive tomorrow.

Admitted Jan. 14, 1949.

(Testimony of Charles Klint.)

Q. (By Mr. Snow): I hand you Plaintiff's Exhibit 24 for identification [279] and ask you if you recognize that? A. Yes.

Q. What is that, Mr. Klint?

A. That is a circular put out by the Vancouver office of the International Electric Fence Company.

Q. Did you receive that circular?

A. This circular was picked up by one of my salesmen from one of our regular dealers.

Q. Picked up by one of your salesmen from one of your regular dealers?

A. And brought in.

Q. By one of the salesmen?

A. It was given to one of my salesmen by one of our dealers who carry our line of fencers and wanted to know if this was something new and different.

Q. There is a notation on the back?

A. Yes.

Q. Was the notation on the back of that circular when you received it? A. Yes.

Q. Will you please read the notation on the back of the exhibit, please?

Mr. Boldt: Extremely hearsay.

The Court: I think I shall sustain the objection. There isn't much dispute here that the Defendant has sold [280] these products in California and in all these other places.

Mr. Boldt: That has been admitted.

(Testimony of Charles Klint.)

The Court: Yes. So that there is no need to take time on that.

Mr. Snow: I am not making proof on that but on unfair business and unfair business practices.

The Court: We are not interested in unfair business practices.

Mr. Snow: I am sorry, your Honor. When I asked to have Mr. Klint put on the stand I made the statement that I asked to have him put on the stand to testify as to unfair competition.

The Court: Let's stay away from that.

Mr. Snow: Then Mr. Klint you will have to step down and come back later. I was trying to avoid having him stay over the week end. He has come from Fresno, California.

Mr. Boldt: Was his testimony completed?

Mr. Snow: Almost.

Mr. Boldt: Why don't you finish.

Mr. Snow: The Judge said he was not interested in hearing it.

The Court: What else is there that you want from this witness? If we went to the next phase of this case, the Defendant admits that he sold down there and that he sought [281] that territory.

Mr. Snow: I am not trying to prove that, your Honor, by this witness. I am trying to show—the actual phase of this case, which is not before you at the moment—just to preserve his testimony and give your Honor the benefit of it—the unfair competition and unfair trade practices.

(Testimony of Charles Klint.)

The Court: Well, you want to show that he was offering them for sale lower?

Mr. Snow: Much lower. And advertising and statements made by his salesmen in the state of California.

The Court: Of course, the evidence is not really admissible because it is hearsay. He says one of his salesmen picked it up from somebody else who says someone from the Defendant corporation handed it to him. Now if you want him to testify further on that——

Mr. Snow: I thought I made myself clear and I apologize to your Honor.

The Court: The weather in California is not as good as it is here but we will let him go back if he wants to.

Q. (By Mr. Snow): Do you know the sales price of Mr. Hughes' 106 controller in your area?

A. It was advertised in rural papers, Pacific Rural [282] Press, in California, in 1945, at twenty dollars, at which time it was selling by our dealers in California for not less than \$22.50; between \$22.50 and \$24.50.

Mr. Snow: Will the Clerk please mark for identification an ad as Plaintiff's Exhibit.

The Clerk: Plaintiff's Exhibit 25 marked for identification.

(Document referred to marked Plaintiff's Exhibit Number 25 for identification.)

(Testimony of Charles Klint.)

Mr. Snow: And it is stipulated by Defendant's Counsel that that is the ad by the Defendant corporation and was published in 1945.

Q. (By Mr. Snow): I would like to have the witness tell me whether or not that is the ad to which he was referring?

A. Yes; that is right.

Q. Did that ad mean anything to you, Mr. Klint?

A. It meant confusion for a while because the dealers didn't understand how we could sell at two different prices. How they could get 106's by writing to San Francisco and get them for twenty dollars and we charge them more than twenty.

Q. Was that information received directly from any person? A. Yes. [283]

Q. From whom?

A. Both the dealers and consumers.

Q. In your area? A. Yes.

Q. Do you know of any other instances of your own personal knowledge where this same subject matter has been brought to your attention and if so, please state the names and dates involved.

A. The Orchard Supply Company at San Jose bought seventy-five controllers from the Hughes' organization and as low as five dollars apiece. The Growers Supply Company within six months bought——

Mr. Boldt: This is hearsay.

Mr. Snow: No; the dealer told him.

(Testimony of Charles Klint.)

A. (Continuing): I have seen those with my own eyes and have repaired some of them.

The Court: What counsel wants to know, Mr. Witness, is you don't know other than what somebody told you what they paid?

The Witness: The dealer himself in one case told me he paid less than ten dollars.

Mr. Boldt: It is hearsay.

The Witness: And we repaired some of those for that dealer.

The Court: That is hearsay testimony. [284]

Mr. Snow: Your witness, Mr. Boldt.

Cross-Examination

By Mr. Boldt:

Q. Mr. Klint, this twenty-dollar price was the list price of your 106, wasn't it?

A. Well, the Chicago list price, you mean.

Q. That is right. A. That may be.

Q. That is right. And the twenty-dollar list price was the same list price for years before that time, during the time Mr. Turk was connected with the Vancouver concern?

A. Well, each distributor sets his price.

Q. The list price as put out by the Vancouver concern during the period when Mr. Turk was connected with it was twenty dollars, the same as when the advertisement was put out, wasn't it?

A. That I don't know.

Q. If there is any change in it it is something that Turk afterwards changed?

(Testimony of Charles Klint.)

A. The list price that you talk about is the Chicago price.

Q. That is what I say, so that if there has been some other change in the list price, it was changed afterwards by Mr. Turk?

A. He did change it, yes. [285]

Q. He did it after his termination with the Washington corporation, if there is a difference?

A. Yes.

Q. Now, one other thing, you say that the parts in this thing are practically interchangeable?

A. In the 106's?

Q. That is right. What do you mean by "Practically"? That isn't quite close enough in most mechanical things.

A. That we can use the same transformers, the same resistors, the same globes. We can use almost all the same parts.

Q. Which is the same thing of practically six or eight or ten or a dozen other fencers of the same kind?

A. No; I wouldn't say that.

Q. How many of the commonly used fencers would that statement apply to?

A. The average fence controller has a specific transformer of a certain size which may not fit in another one.

Q. My question is, how many of the fencers commonly distributed in the West would this state-

(Testimony of Charles Klint.)

ment apply equally well to with respect to the interchange of parts? How many?

A. Practically none.

Q. Not "practically." How many? Are there any that your statement would apply equally well to? [286]

A. Possibly one other.

Mr. Boldt: That is all.

Mr. Snow: That is all.

The Court: You may step down.

(Witness excused.)

The Court: I shall have to adjourn this case now because I have other matters set at four-thirty, and the case will go over until Monday at eleven o'clock, and we will see if we can't finish it on Monday. If there is any reason why it will go over, I will have Tuesday available.

Mr. Boldt: The only concern I have is to notify the King County Court for that calendar.

The Court: You people should know better than I do.

Mr. Snow: My case is complete on the trade mark.

Mr. Boldt: My cross-examination won't be more than fifteen or twenty minutes, so that we can finish that first on Monday.

The Court: And then the only other phase is the question if the Defendant was unlawfully using this trade name what, if any, damages are shown by the facts in the case and should the plaintiff recover. The statute doesn't make it mandatory that there be a recovery. It is an equitable procedure.

Mr. Boldt: I think we can finish Monday. At one [287] o'clock Monday?

The Court: At eleven o'clock. Exhibit 25 will be admitted.

(Plaintiff's Exhibit 25 for identification received in evidence.)

PLAINTIFF'S EXHIBIT No. 25

International No. 106 Maxi-Shock outshocks all other fencers on dry ground.

Farmers swear by it—stock greatly respect it. Designed for tremendous wallop even during dry weather, yet completely Safe and dependable under all conditions.

Electric Fence Saves Money, Get Strong Shocks—Miles Away.

Maxi-Shock Fencers will hold anything—sheep, hogs, cattle, horses, etc. Farmers are using this unit and smooth wire with outstanding success. Strong shocks transmitted on fences up to 20 miles in length. Many counties have over 1000 units of this No. 106. 110 to 120 volts AC input. Safe, dependable, guaranteed. Price \$20.00.

Attractive discounts to Dealers and Jobbers. Write for circulars and other information. International Electric Fence Co., Inc., 420 Market St., Box 57 Phone Sutter 8854. San Francisco, California.

Admitted Jan. 14, 1949.

The Court: We will adjourn this case now then until Monday morning, at 11:00 o'clock.

(Whereupon, at 4:35 o'clock, January 14, 1949, a recess was had in this cause until 11:00 o'clock a.m., January 17, 1949.)

(Counsel heretofore noted being present, the following proceedings were had.)

The Court: Now you may proceed.

Mr. Boldt: Mr. Turk, I believe, was on the stand. I think the point we are at is the cross-examination of Mr. Turk.

Mr. Snow: You hadn't started yet.

Mr. Boldt: That is right. [288]

RICHARD H. TURK

a witness for and on behalf of the Plaintiff, was recalled and, having been previously duly sworn, testified as follows:

Cross-Examination

By Mr. Boldt:

Q. Mr. Turk——

Mr. Boldt: In view of the fact that the examination was rather extensive and your Honor conducted part of it I will boil my cross-examination down with that in mind.

Q. (Continuing): I would like to bring out, Mr. Turk, the initial use of the name "International" as applied to electric fencers. So far as you know it was by yourself and Soper early in 1938, is that not correct? A. That is right.

(Testimony of Richard H. Turk.)

Q. Have you ever heard of it being applied to fencers anywhere else?

A. Yes, I heard of it. A company went broke up around Duluth.

Q. Where? A. Duluth, Minnesota.

Q. Yes. I was going to ask you about that. So that, actually, there was a prior use of this name "International" by some other concern in Minnesota?

A. We never heard about that until two or three years [289] afterwards.

Q. I am not concerned about when you heard about it. There was a concern prior to the time you used it, in Duluth, Minnesota, that had used the name but you didn't know about it until later?

A. It was the firm name. It wasn't a trade mark. In other words, it wasn't used the way we used it.

Q. There was then, you now know, a concern using the name "International" electric fence?

A. There was a firm named "International Electric Fence," and I think it was in Duluth.

Q. Minnesota — which was conducting business prior to the time that you first began conducting business under that name; is that correct?

A. There was a firm in business by that name. What their business was, I don't know.

Q. You now know, although you didn't know at the time, that there was a concern in Duluth, Minnesota, that was operating under the firm name "International Electric Fence Company" prior to the

(Testimony of Richard H. Turk.)

time that you engaged in that business; is that correct? A. That is correct.

Q. Now, so far as your use of it was concerned, you began using it with Soper in the early part of 1938; is that correct? [290]

A. That is correct.

Q. Now, when you say "early part," you don't fix any specific date for that. You mean some time in the early Spring?

A. We formed our company about in January and I don't know, probably in March when we put out our first controllers.

Q. So that along about in March, 1938, is the first time that any controllers were actually put on the market by you under the name "International"?

A. That is right.

Q. And at that time it was a joint operation by you and Soper; is that correct? A. Yes.

Q. Now, I believe that at the time Soper went to Chicago, you told—strike that. That question is confusing. I believe you told us, Mr. Turk, on Friday or Thursday, Mr. Soper asked you for permission to use the name "International" on fencers that he was going to manufacture in Chicago?

A. He asked for permission to produce the unit for me. In other words, he wanted to manufacture.

Q. That is what I understood you to say, that he asked you for permission to permit him to manufacture these fencers in Chicago under the name "International"; is that [291] correct?

(Testimony of Richard H. Turk.)

A. Not exactly, the way you put it.

Q. Then what is correct? State it exactly correct.

A. He asked if I would allow him to produce the controllers. In other words, he wanted to produce all the controllers and let me just handle sales.

Q. Well, Mr. Turk, Mr. Soper didn't have to ask you for your permission to produce the controllers, did he? There are any number of people manufacturing electric fence controllers in the United States, so that he didn't have to ask your permission to do that.

A. He did not ask my permission to do that.

Q. That is right. But he did ask you for permission to make controllers that would bear the name "International"; is that right?

A. That isn't right either.

Q. All right, explain what you mean. I don't understand.

A. He wished to produce all the controllers and me sell the controllers on the West Coast.

Q. I see, so that what you tell us then is that, in substance, you agreed on an arrangement for a separation of the right of manufacture and the right of sales. Is that, in substance, what you are telling us now? Both of them related, of course, to the name "International"? [292]

A. Approximately, yes. That wasn't—initially it was set up to produce only one or two models and then very shortly thereafter he produced all models.

(Testimony of Richard H. Turk.)

Q. But the substance of it was, as I understand it, you and Soper had an understanding that he would manufacture these products under the name "International" and you would sell them; is that right?

A. That is right.

Q. So that you agreed between you——

A. That he was limited in my territory.

Q. To the Western states? A. Yes.

Q. So that you agreed to have—to do the distributing and selling of these products under the name "International" in the Western states and Soper undertook to do the manufacturing of the product, first one or two models, and then later all the models?

A. That is right.

Q. In substance, that was a division between you in the right of the name, he to use it in the manufacturing of the product and you to use it in the sale and distribution. Is that correct?

A. Well, I would say—I want to put it that he was to do the, have all the——

Q. I would like to have you answer the question, if [293] you can. If you can't, why you can't, but if you can answer the question, I wish you would answer it. I will repeat it if you wish.

Mr. Snow: Let the Reporter read it.

Mr. Boldt: Yes. Will you read it?

(Whereupon, material appearing on lines 19 through 22, both inclusive, page 293, read by Reporter.)

(Testimony of Richard H. Turk.)

Q. (By Mr. Boldt): And I will repeat the question. In substance, then, this agreement was with Soper that he, Soper, was to manufacture the products under the name "International" and you were to undertake the sale and distribution of those products under the same name in the Western States?

A. There was a division there. Soper to produce and I to do nothing but sell in the West.

Q. All right. Then my statement is correct. In substance you retained the right to sell and distribute.

A. I retained the right to sell and distribute.

Q. Under the name "International" of course?

A. That is right.

Q. And he undertook to do the manufacturing of it?

A. That is right.

Q. Now, that agreement was never reduced to writing, was it?

A. It was in correspondence. [294]

Q. It was never made——

A. Any formal contract? No.

Q. in any formal contract, and that agreement was subject to termination at your will, was it not? The will of either one of you?

A. I suppose that anyone can back out on an agreement.

Q. Now, Mr. Turk, let's not put it that way. There was nothing to prevent either you or Mr. Soper from withdrawing from that arrangement at any time you saw fit, was there?

(Testimony of Richard H. Turk.)

A. There were no penalties; no.

Q. Was there anything to prevent either you or Mr. Soper to withdraw from that oral arrangement at any time you saw fit? A. I don't think so.

Q. You recall Mr. Soper's testimony at the time of the taking of the deposition when he so testified, do you not? A. I think so.

Q. That that was his understanding, that whatever your arrangement was it was subject to either one of you terminating it at any time you saw fit; is that correct? A. I would think so.

Q. So that then your right, according to your theory of the case, to sell and distribute these fencers and allied [295] products under the name "International" in the Western States continued on down through the years and continues to the present time; is that correct? A. Yes.

Q. And at the time that the Washington Corporation was organized you had the right, as you understood between you and Soper, to sell and distribute fencers and allied products under the name "International" throughout the Western States?

A. That is right.

Q. And it is your theory, however that the right to manufacture the product was at that time in Soper? A. It was.

Q. That is your theory of the present case?

A. Yes.

Q. But there is no question but that at the time that the Washington corporation was organized you,

(Testimony of Richard H. Turk.)

according to your theory, had the right to sell and distribute such products throughout the Western States under the name "International"?

A. That is right.

Q. And you continued to own it isn't that right, at the time that you conveyed your interest in the business to the Washington corporation, did you not?

A. I did not convey—— [296]

Q. We will get to that in a moment. My question is, you continued to own it, isn't that right, according to your theory until the time that the Washington corporation was organized?

A. I continued to hold that right after the Washington corporation was formed.

Q. Will you kindly answer my question? My question is, did you not continue to own and hold that right, namely to sell and distribute fences and allied products in the Western States under the name "International" up to the time that you participated in the incorporation of the Washington corporation?

A. The Washington corporation was one of my distributing firms like the International Fence Company of Idaho.

Mr. Boldt: Your Honor——

The Court: Just try to answer the question.

Q. (By Mr. Boldt): There is no occasion for you to debate about the matter. It can be answered yes or not. Do you not—did you not, according to

(Testimony of Richard H. Turk.)

your theory, own and hold the right to sell and distribute fenceers and allied products under the name "International" in the Western State up to and including the time that the Washington corporation was organized? [297]

A. Up to and including?

Q. Yes. A. Yes; I did.

Q. Now, Mr. Soper—or Mr. Turk, your supposed conveyance or right to manufacture these products was wholly oral? A. No; it was written.

Q. Do you have any documents showing conveyance to Mr. Soper? A. No; I do not.

Q. Then it rests wholly, at the present time, on your oral statement to that effect; does it not?

A. And Mr. Soper's statement.

Q. Well, we will read Mr. Soper's testimony sometime. Other than what is in Mr. Soper's deposition, and your oral testimony, there is no other conveyance? A. I don't think so.

Q. Now, Mr. Turk, at the time that the Washington corporation was organized, did you inform Mr. Hughes or Mr. Soper or anyone connected with the matter that you had previously conveyed the right to use the name in question to someone else?

A. I reserved the right.

Q. Kindly answer the question, please. My question to you, sir, is, at the time that the Washington corporation [298] was organized, did you inform Mr. Hughes, Mr. Schaefer or anyone on their behalf of the fact that you had previously conveyed away

(Testimony of Richard H. Turk.)

a substantial part of the right of the use of the name "International"? As applied to electric fencers? It was not written.

The Court: The question is, did you inform them? Say "yes" if you did.

A. I reserved——

The Court: No. Did you inform them.

The Witness: They knew it already.

The Court: That doesn't answer the question.

The Witness: I didn't state to them that I was transferring a trade mark to them because there was no occasion to do so.

Q. (By Mr. Boldt): In other words, you didn't say anything to them about it at all?

A. As far as the trade mark is concerned?

Q. That is right.

A. No; I didn't because I had no right then.

Q. Irrespective of what your reason was, as I understand it now, you state that you did not tell Mr. Hughes or Mr. Schaefer or anyone what ever in their behalf that you were not conveying the right of the use of the name "International"? [299]

A. There is a distinction there.

Q. Well, just answer the question, Mr. Turk. Did you or did you not? A few moments ago I understood you to say——

The Court: I think he has answered. He said he did not. If the Court is wrong in drawing that inference I want it corrected.

Q. (By Mr. Boldt): Now.

(Testimony of Richard H. Turk.)

The Court: He said, likewise, that they already knew it.

Mr. Boldt: I understood him to say that.

The Court: Now, I wish you would go ahead and tell why they knew it.

The Witness: Why they knew it?

The Court: Yes.

The Witness: I conveyed the right to use the name "International", "International Electric Fence Company", as a business in the states of Oregon and Washington, and I reserved all that territory of Eastern Washington from the Columbia to Idaho and that part of Oregon from the Blue Mountains down through Ontario and Baker and Mr. Wyatt and Mr. Klint——

Mr. Boldt: Now you are——

Mr. Snow: He is answering the Judge's question. [300]

Mr. Boldt: He isn't.

The Witness: ——were reserved to me and the other territory of Montana and the other States and from those areas after that when I made a sale at twenty dollars retail——

Mr. Boldt: If your Honor please, this would be very long if we permit such wide deviation. His question was why didn't you inform Mr. Hughes or Mr. Schaefer?

The Court: No; the Court's question was how did they know. He said they already knew it.

The Witness: Well, because——well, I told them

(Testimony of Richard H. Turk.)

that I was reserving that other territory. He knew that. He knew the——

The Court: No; don't tell what he knew. You don't know what another person knows.

The Witness: Maybe I should say he should have known because——

The Court: Whatever you said. Since there was no direct writing on it, you may testify to whatever you said to Hughes.

The Witness: Well, this corporation was formed——

The Court: No.

Mr. Boldt: Let's keep your mind on this. At the time that Mr. Hughes came over and gave you two thousand dollars in cash—which he did. [301]

The Witness: That is right.

Q. (By Mr. Boldt): What, if anything, did you tell him at that time about any limitation on the right of the new corporation, or your partnership as it was then formed between you, of the use of the name "International"? What did you say to him, if anything?

A. There was nothing said about the use of the name "International" as a trade mark.

Q. Thank you.

A. Because I reserved—this was just a sales corporation, the same as the one Mr. Wyatt had. It had no more right.

Mr. Boldt: Please don't argue about it.

The Court: We don't care for the arguments.

(Testimony of Richard H. Turk.)

The Court will have to draw inferences from the facts rather than your arguments.

Q. (By Mr. Boldt): So that at the time Mr. Hughes paid you this money you did not make any statement at all about any limitation in the right of the use of the name "International" for the business or product; is that correct, Mr. Turk?

A. I believe that is correct.

Q. All right. Now, previously to that time, you had [302] filed in the office of the Clerk of the Court at Vancouver a certificate of assumed name, hadn't you?

A. Yes; I had.

Q. And in that certificate you, of course, listed this name "Electric—"International Electric Fence Company", being your assumed name; right?

A. Right.

Q. And Mr. Hughes was aware of the fact that you had filed that; is that not correct?

A. I don't know whether he was aware of it or not; but it makes no difference.

Q. I see. In any case, you had for some considerable period of time been transacting business under the name "International Electric Fence"?

A. Yes.

Q. And you had been using the name "International" in connection with the products sold and distributed by that company; right?

A. Yes.

Q. And not only that, but during the period when you were in Vancouver you actually had manu-

(Testimony of Richard H. Turk.)

factured some four or five hundred of these products right in the City of Vancouver hadn't you?

A. Yes.

Q. And Mr. Hughes knew of the fact that you had [303] manufactured several hundred of these in Vancouver, didn't he? A. Yes.

Q. And that at the time you manufactured them, whatever agreement you had with Soper wasn't in effect at that time; was it?

A. The agreement I had with Soper at the time I manufactured was not in effect.

Q. That is what I said.

A. It was taken later.

Q. So that it wasn't in effect at that time?

A. No, sir. In effect prior to the time I sold out to Mr. Hughes.

Q. I understand your story about that, but at the time you manufactured these four or five hundred, which was in the year 1940, according to your testimony—— A. 1938 and in——

Q. Now, wait a minute. In 1938 you were in Oregon.

A. Also manufacturing in Vancouver, Washington.

Q. All right. Did you manufacture some as late as 1940 in Vancouver? A. No.

Q. Then your previous statement about that was in error, was it? A. I imagine it was. [304]

Q. Now, Mr. Turk, you manufactured four or five hundred of these units after Mr. Soper went back to Chicago? A. That is right.

(Testimony of Richard H. Turk.)

Q. So that your supposed arrangement with Soper was made sometime after Soper had gone back to Chicago?

A. That is right.

Q. And that was sometime in the year 1938; is that right?

A. This agreement with Soper?

Q. No. The time Soper went to Chicago?

A. Soper went to Chicago in 1938.

Q. That is what I said. Now, Mr. Turk, the other day you gave us the feeling, or inferred, that you didn't actually get the two thousand dollars from Mr. Hughes and that you applied it to the company. You received the two thousand dollars personally, did you not?

A. And paid company bills with it; yes.

Q. Let's get on to one thing at a time. You received the two thousand dollars personally, didn't you?

A. The company—probably the check was made out to R. H. Turk.

Q. You received the two thousand dollars personally, didn't you?

A. Yes; and paid company bills with it.

Q. I heard you say that a moment ago. Answer one [305] question at a time sir. Now, can you show us anywhere in this journal which you have examined very minutely any record of your having paid any company bills outstanding personally?

Mr. Lyon: You know that the Journal doesn't refer to anything before October.

(Testimony of Richard H. Turk.)

Mr. Boldt: That is the date the corporation was organized, Counsel, October 1941.

Q. (By Mr. Boldt): Wasn't it, Mr. Turk?

A. Yes.

Q. And that is when this journal begins, doesn't it?

A. I don't know.

Mr. Lyon: The check was made out in July and the journal started in October, as you very well know.

Mr. Boldt: You are very much mistaken.

The Court: Counsel will have to refrain——

Mr. Boldt: You are mistaken.

The Court: Mr. Boldt. Counsel has to refrain from talking and arguing between themselves. You will address your remarks to the Court.

Q. (By Mr. Boldt): Well, Mr. Turk, the journal book that you are now examining, is the original journal book used by you and Mr. Turk (Hughes) from the time that the corporation was [306] organized, isn't it?

A. I would assume so.

Q. You have seen it many times, haven't you, Mr. Turk?

A. I see some entries here——

Q. I say, you have seen that book many times during your interest in the Washington corporation?

A. Yes.

Q. And in that book are the financial records from the very beginning and carried down through the years, aren't they?

A. I presume so.

Q. You examined it at considerable length; isn't that correct?

A. Yes.

(Testimony of Richard H. Turk.)

Q. And have you been able to find any such transaction as you refer to as payment of company accounts out of personal funds of yours?

A. Pardon me.

The Court: The question is, do you find anything in the book that shows that you paid any of the corporation's obligations?

The Witness: No; I don't see it there. Is this book in evidence, may I ask?

Mr. Boldt: What? [307]

The Witness: Is this book in evidence, may I ask that please?

Mr. Boldt: If you want it in evidence——

The Witness: Please put it in evidence.

Mr. Boldt: You are free to refer to anything you want to.

The Witness: Please put it in.

The Court: You are free to ask your counsel.

The Witness: Pardon me.

Q. (By Mr. Boldt): Now, as I understand it, Mr. Turk, at the time you organized this corporation its activities were to be limited and restricted to Oregon and Washington; is that right?

A. Pardon me; will you state that question again.

Q. I say, at the time you organized this corporation its activities in the sale and distribution of fencers and allied products was to be limited to Oregon and Washington?

A. To parts of Oregon and Washington.

Q. Not the whole of those states?

A. That is right.

(Testimony of Richard H. Turk.)

Q. Did you make any such limitation in the articles of incorporation that you signed?

The Court: Referring to Exhibit——

Mr. Boldt: A-6.

A. No. [308]

Q. But you testified on oath that you had, didn't you, when your deposition was taken in Chicago?

A. The corporation was limited at that time; yes.

Q. I say, you testified under oath that there had been such a limitation in the articles of incorporation, didn't you? When——

A. I don't know if I did or not.

Mr. Boldt: Can I have the original of his testimony, please?

Q. (By Mr. Boldt): When your deposition was taken on oath, didn't you testify as follows: "Question: And you were the president of the corporation, weren't you?" Page 11. "You were the president of the corporation, weren't you?" Answer: "That is true". Question: "All right; now answer the question: Did you provide in the corporate records of the Washington corporation any reservation of the kind I have mentioned? Mr. Snow: Do you fully understand the question? Mr. Boldt: He understands it all right. The Witness: The sales were limited to Oregon and Washington. Mr. Boldt: Won't you answer the question? Answer: I am. I am stating that the corporation charter limits it to sales in Oregon and Washington. Question: Have

(Testimony of Richard H. Turk.)

you a copy of it? Answer: I have. Question: And it says that in there, does it? Answer: It does that."

A. Pardon me. The question a moment ago——

Q. First of all, let me ask you if you testified as I have just read? A. Yes.

Q. Of course, it isn't true, is it?

A. I think it is.

Q. Will you give me the corporation charter that shows such a limitation, please? Give it to me now. You said you had a copy of it. I understood, in your testimony in Chicago——

A. I didn't have it in my hands. Let me state that——

Q. Now, the question right now, Mr. Turk, is that you testified in Chicago that the corporate records limited the activities to Oregon and Washington and you were specific in it and said you had a copy of it and I want to know if that is true or not true, and if it is, give us a copy of it now.

Mr. Snow: Ask him if he has a copy in the court room.

A. I will admit I am in error on it.

Q. (By Mr. Boldt): All right. Now, Mr. Turk,——

Mr. Boldt: There is one exhibit that your Honor may have been examining. It was a yellow page. That is the one. [310]

Q. (By Mr. Boldt): Handing you now, Mr. Turk, what is marked here as A-11, and I will ask you to examine that, that purports to be a memorandum showing the assets of your business prior——

(Testimony of Richard H. Turk.)

at the time of and immediately prior—to the incorporation of the Washington corporation; is that correct? A. I don't know, sir.

Q. Well, if it is not correct, in what respect is it not correct? A. I wouldn't know that either.

Q. Then if it is not correct you don't know in what particular it wouldn't be?

A. Mr. Hughes has the books on that.

Q. The question is, if there is anything incorrect about that, you can't recognize it now?

A. I have nothing that would, that I could base it upon.

Q. I don't care about that. If there is anything about it that is incorrect, you can't recognize it now? It appears to you to be correct with respect to the matter it recits?

Mr. Snow: I don't think it is a fair question.

Mr. Boldt: Why isn't it?

The Court: He may answer. He should be able to answer that. [311]

A. I do know that Mr. Hughes made out a bank statement in May—

The Court: No, let's stay with this. It enumerates certain items, company assets of the corporation, and certain obligations that it had, and a certain sum of money paid to you.

Q. (By Mr. Bolt): If there is anything incorrect about it, you can't recognize it now, Mr. Turk, is that right?

A. I don't know. I haven't got the records. Mr. Hughes has the records.

(Testimony of Richard H. Turk.)

Q. Is there anything about it that appears in error as far as your memory of the transaction is concerned?

A. I thought we had considerably more assets at the time.

Q. You thought you did?

A. That is right.

Q. But you couldn't point out in what particulars? A. No; I can't.

Q. Also, Mr. Hughes—or Turk—

Mr. Boldt: Incidentally, A-7, the Clerk informs me, was never admitted. I offered it in evidence. A-7 is the original extract of minutes signed by Mr. Turk and Mr. Hughes.

The Court: I think there is no objection. [312]

Mr. Boldt: No. Counsel wanted to reserve until he took a look at it, or something like that.

Mr. Snow: My only objection is that it is loose leaf matter and I don't know whether it is the same or not.

The Court: Objection overruled. It will be admitted.

(Defendant's Exhibit Number A-7 for identification received in evidence.)

DEFENDANT EXHIBIT A-7

INTERNATIONAL ELECTRIC FENCE CO., INC. MINUTES OF THE FIRST ANNUAL MEETING OF THE DIRECTORS

The annual meeting of the directors was held at the hour of 2:00 p.m. on Tuesday, November 4,

(Testimony of Richard H. Turk.)

1941, at the office of the corporation in Vancouver, Washington.

All of the directors were present, and a waiver of notice of said meeting was signed by all of the directors and filed.

The meeting was called to order by R. H. Turk, who was elected chairman, and G. N. Hughes was elected secretary. The following directors were elected in the manner provided by law: R. H. Turk, Phyllis W. Turk, G. N. Hughes and Bertha V. Hughes.

Upon motion duly made, seconded and carried, the board then proceeded to the election of the officers under the by-laws of the corporation, which election resulted in the unanimous election of the following officers:

President	R. H. Turk
Vice-President	Phyllis W. Turk
Manager	G. N. Hughes
Treasurer	Bertha V. Hughes
Secretary	G. N. Hughes

The matter of salaries for the forthcoming year was discussed, and it was agreed that the salary of the president should be fixed for the forthcoming year at \$200.00 per month and that the salary of the manager be \$200.00 a month, but if the president was unable to perform his duties or a substantial part thereof, the salary then of the manager should be at the rate of \$250.00 a month.

(Testimony of Richard H. Turk.)

R. H. Turk and G. N. Hughes had heretofore owned certain assets as co-partners, and were doing business in Vancouver as an electric fence company, and had built up a business and created good will. The said assets consisted of machinery, equipment, good will, accounts receivable, etc. Said G. N. Hughes and wife and R. H. Turk and wife then offered to convey to the corporation all of the assets of said co-partnership in full payment of the capital stock subscribed by R. H. Turk and wife and G. N. Hughes and wife. It was thereupon duly moved, seconded and carried that the best interests of the company would be furthered by accepting the offer; that the reasonable value of the said assets was \$4,000.00, and the officers of the corporation were thereupon instructed and authorized to issue to the stockholders common stock in payment of said assets, and that their stock subscriptions were considered paid in full.

There being no further business to come before the meeting, it was adjourned.

/s/ R. H. TURK,

[Seal] President.

Attest: /s/ G. N. HUGHES,
Secretary.

The foregoing minutes were duly approved this 4th day of November, 1941.

/s/ G. N. HUGHES,
Secretary.

(Testimony of Richard H. Turk.)

Q. (By Mr. Boldt): Have you examined that?

A. Yes.

Q. Mr. Turk, that is your signature on the document? A. I believe it is.

Q. And you were the president of the company at the time those minutes were made?

A. That is right.

Q. But as I understand your story now, what is recited in there is not correct, is that right?

A. I imagine that that is correct.

Q. It is correct? A. Yes.

The Court: What Counsel evidently has in mind is that that statement lists the assets being transferred to the corporation.

The Witness: There was no copartnership at any [313] at any time between Mr. Hughes and myself.

Mr. Boldt: Not that that is of any importance.

The Court: It might be. What was happening between July 1 and October 10th?

Mr. Boldt: In July, your Honor, in this instance, is the sale of the stock. This is the incorporation.

The Court: That is 1944?

Mr. Boldt: 1941.

The Witness: Pardon me. There is one item I overlooked here.

Mr. Boldt: Just a moment.

The Witness: This was no copartnership. This is in error here.

(Testimony of Richard H. Turk.)

Q. (By Mr. Boldt): I see. I wondered if you wouldn't get around to that.

Mr. Boldt: Now I will show this to Counsel.

Q. (By Mr. Boldt): The corporation was authorized to do business on October 9, 1941, wasn't it? You can take Mr. Snow's word for it.

A. Approximately that.

Q. Authorized to carry on business in the State of Washington as of that date; is that correct?

A. Yes. [314]

Mr. Boldt: You can put it in evidence, if you want it.

Mr. Snow: I don't think that is necessary.

Mr. Boldt: May the record show that the corporation was duly and regularly authorized to transact business in the State of Washington as of October 9, 1941?

Mr. Snow: I think we stipulated to that.

Q. (By Mr. Boldt): Now, the date of the meeting you are referring to in the minutes is what date? A. Sir?

The Court: What date is on the document?

The Witness: This is the fourth day of November.

Q. (By Mr. Boldt): So that there was an interval between the time when you got the money from Mr. Hughes, of two thousand dollars that you got from him in purchase of one-half of the assets as shown by Exhibit A-7—no, not 7—A-11. This one. There was an interval between that date,

(Testimony of Richard H. Turk.)

10/1/41, which is recorded at the top, and the date of the transaction when the corporation officially accepted the proposition of your paying for your corporate stock by transferring assets; is that right?

A. If we were partners, I didn't know about that.

Q. The question is now, is that not the fact? [315]

A. You draw up something here that I didn't—

The Court: It is self evident. There is no need to ask a question or have the answer.

Q. (By Mr. Boldt): Particularly from the time you got the money. You got the money as of October, 1941, didn't you? A. Yes.

Q. That is right, from Mr. Hughes?

A. Yes.

Q. Now, Mr. Turk, stepping ourselves down to the time when Mr. Hughes bought the balance of stock in the Washington corporation, which was as of July 1, 1944—will you do that now? There is no need to look at that for the time being. Now, as I understand it, before that deal was closed, Mr. Hughes told you that, of course, he wanted the trade name?

A. He didn't tell me that at the time.

Q. Now, Mr. Turk, I have examined your testimony in my notes and I find on both sides of that matter and I want to get it straight. Once you said

(Testimony of Richard H. Turk.)

it was not mentioned. Then next that it was not mentioned between you until after Hughes bought the balance of the stock.

A. He wanted to buy the trade name afterwards.

Q. You testified to that effect at one time and at another time you told the Court that before that deal was [316] concluded Mr. Hughes told you that he wanted the trade name. Didn't you so testify to both of those?

A. In one letter he mentioned that he would like to buy the trade name.

Q. All right. Regardless of what you testified to before, what is the fact now? Did he inform you before the deal that he wanted the trade name? What is your final say, Mr. Turk?

Mr. Snow: July 1st 19—forty—

Q. (By Mr. Boldt): The question is—listen—did Mr. Hughes either write or say anything to you before the time that you sold him the balance of your stock in the corporation that he wanted the trade name?

A. He mentioned it in one letter, that he wanted to acquire the trade name?

Q. All right. Now, the upshot of it is that he did mention it to you before you finally—before he finally purchased the stock, is that right?

A. In one letter; yes.

Q. The upshot of it then is, that that subject was mentioned by Mr. Hughes and he indicated that he wanted the name before he bought the balance of your stock; is that the last word on it now?

(Testimony of Richard H. Turk.)

A. Yes. [317]

Q. That is it. Now, when that transaction was consummated—that is fancy language—when you closed the deal for him to buy your stock and he paid you this money, thirteen thousand odd dollars, did you make any reservation of any kind, either oral or written, with him concerning the use of the name? A. Yes.

Q. Was it oral or written first? A. Oral.

Q. And where; and when?

A. When the deal was completed there.

Q. Where? A. In Vancouver.

Q. Where in Vancouver?

A. Sitting in the truck.

Q. And that was the day that the deal was concluded and these figures were put down on the memorandum? A. That is right.

Q. But there was no other record made of such a reservation made by you? A. That is right.

Q. And what exactly did you tell Mr. Hughes about it at that time?

A. Well, Mr. Hughes stated—

Q. No. I asked you what did you tell Mr. Hughes at [318] that time?

A. That was a matter of five years ago and the exact words are not remembered.

Q. That is one reason why it is an awfully good idea to write down important matters of that kind.

The Court: I think that is argumentative. He can give the substance of what was said.

(Testimony of Richard H. Turk.)

A. Well, the substance of it was that he would conduct the business in Vancouver as it had been.

The Court: No, the question is: what did you say in effect, in substance, with reference to a reservation of the trade name?

The Witness: I told him that I would be willing to sell my stock to him on his agreement to buy all of his merchandise from me and to pay me thirty-three and one-third per cent which would compensate me for the loss of over twelve thousand dollars a year in profits. That he agreed to do.

Q. (By Mr. Boldt): Well, when you get through now, I want you to tell us what you said about the trade name? That is the question, sir.

A. If I was selling him the merchandise——

The Court: Not argument.

A. (Continuing): I had the trade name and had not transferred the trade name to him. He was to buy his stock [319] from me under my trade name.

Q. (By Mr. Boldt): The question is, what did you say, if anything, to Mr. Hughes concerning the trade name?

A. I told him he would have to buy his stock from me under my trade name.

Q. You told him that? A. I did.

Q. Analyze that transaction. I understand, the substance of your version of the transaction, Mr. Turk, is that Mr. Hughes was to pay you all of the balance of your salary, amounting to sixty-four hundred dollars, thirteen thousand odd dollars for

(Testimony of Richard H. Turk.)

your interest in the physical and intangible assets of the corporation,—in other words, he was to pay you twenty thousand odd dollars—and yet you were to retain your full participation to the full extent in the profits and income of that Washington corporation. Is that the substance of the transaction?

A. Well, he got the physical assets.

Q. Answer the question. Isn't that so? The substance of your story is that Mr. Turk—Mr. Hughes, was to pay you twenty thousand odd dollars and yet the arrangement that you say he agreed to would permit you to continue to draw approximately fifteen thousand dollars a year out of the interest in the Washington corporation; is that right? [320]

A. Well, under the deal made——

Q. Is that correct or not? Is that what you are telling the Court that you proposed to Mr. Hughes and he agreed to?

A. He agreed to it; yes.

Q. In other words, you are telling the Court that Mr. Hughes agreed to pay you the full price of your stock plus a substantial allowance, and yet you were to continue, by means of your raising price, to share fully, without diminution, in the profits of the Washington corporation; is that right?

A. Yes; that is right.

Q. And you say Mr. Hughes agreed to that?

A. He did.

Q. And in addition to that he agreed to purchase all of his requirements from you? Right?

(Testimony of Richard H. Turk.)

A. All—he agreed to buy all of his International Electric Fence controllers from me.

Q. Did he agree to buy all of his merchandise from you and did he accept your statement that he had no right to use the name at all and that you reserved it? A. He did.

Q. And moreover, he agreed to your theory that he would exclusively buy all of his products from you; is that your version of what this agreement was? [321]

A. He did not agree to buy all of his fence controllers from me. He could buy other makes of fence controllers from other parties, but the only thing he could sell in Washington State in any quantity was the International and he had to buy that from me.

Q. Then, Mr. Turk, according to your version and understanding of what the transaction was, that was really a very, very poor transaction for Mr. Hughes to make, wasn't it?

A. I think it was a poor transaction for me to make. Mr. Hughes benefited.

Q. Let me ask you if you didn't then know that Mr. Hughes had no right to use the name, and you knew that International was the only thing he could sell, and you knew that if he didn't buy from you he would be out in the cold and lose his entire investment in the business—did you know those things?

(Testimony of Richard H. Turk.)

A. I knew that he couldn't manufacture International Electric fence controllers.

Q. Did you know the things I have just enumerated at the time you made this transaction?

A. All those things wouldn't have been true.

Q. Did you know those things? Let me ask you if I didn't ask you the following question and answer?

A. I don't know if they were true. They wouldn't have [322] been true.

Q. Let me ask you—page 15—Question: "And that is your understanding, that you could have an oral contract restraining him for all future time?" Answer: "I knew Mr. Hughes had no right to use the name, and I knew International was the only thing he could sell, and I knew if he didn't live up to his contract he would be out in the cold".

A. That is right; it is still right.

Q. And that was your idea of what the transaction was, that Mr. Hughes would pay you twenty thousand dollars odd and be in a situation where you could cut him off and put *in out in* the cold and terminate his business at will. Is that what you agreed to the day you sat in the truck?

A. I owned fifty per cent of the assets of that corporation. Mr. Hughes got value received for his money.

Q. Is it your understanding of the agreement that what you agreed to when you sat in the truck was that Mr. Hughes was going to pay you twenty

(Testimony of Richard H. Turk.)

thousand dollars in cash, plus, and that he was going to place himself in a situation where he had no right whatever, even a sales right, to use the name "International" in that business, and place himself in a situation where he had to get all his products from you and if you saw fit you could cut him off in a moment; is that true?

A. That statement is not true. [323]

Q. That is what you said in the deposition.

A. I could cut him off; yes.

Q. And you say that Mr. Hughes agreed to that?

A. Mr. Hughes agreed to that; yes.

Q. And all oral. A. Yes.

Q. Not the slightest memorandum of any such extraordinary agreement? A. No.

Q. Now, Mr. Turk, this name "International", as connected with the affairs of the Washington corporation had a substantial value as early as the early part of 1941 didn't it? A. Yes.

Q. It was a valuable asset of the business you were conducting down there, wasn't it?

A. The firm was well known. It became very well known.

Q. The name "International" was a valuable asset in the business you were conducting down there long before the corporation was formed, wasn't it?

A. The firm name, "International Electric Fence Company" was a valuable asset.

(Testimony of Richard H. Turk.)

Q. The name "International", as applied to the products of the company down there was a valuable asset long [324] prior to the Washington corporation in 1941?

A. I didn't have the name to apply to the product and neither did Mr. Hughes.

Q. The name "International" was a valuable asset for the Washington business prior to the time that the corporation was organized?

A. It didn't belong to the Washington business immediately prior to the incorporation.

Q. You had some right to the name because you were using it? A. So did Mr. Wyatt.

Q. Prior to the incorporation of the Washington corporation you were using the name "International" on products sold and distributed by your company?

A. We were not using it as a trade mark in Washington State in 1941.

Q. What name did you apply then?

A. We didn't apply it. Mr. Soper did.

Q. Did you——

A. As manufacturer, Mr. Soper did.

Q. But you were selling and distributing products under the name International, weren't you?

A. As made by Mr. Soper; yes.

Q. And that was a valuable asset?

A. The sales asset was a valuable asset and Mr. Hughes [325] bought a franchise to sell in Oregon and Washington and that is all he did buy.

(Testimony of Richard H. Turk.)

Q. The right to sell International fencers was a valuable asset of the business you were conducting in the State of Washington before the corporation was organized?

A. I had a valuable asset in my right to sell throughout the Western States and that was not transferred to the Washington corporation.

Q. The right to sell and distribute fencers under the name "International" was a valuable asset of the business you were conducting in Vancouver, Washington, prior to the incorporation of the Washington corporation? A. It was

Q. Did you make any reservation at any time in the minutes or other corporate records at the time that the corporation was formed limiting that?

A. I would say so.

Q. Show it to me first. Show me where the reservation is indicated in those minutes.

A. It says the assets consisting of machinery, equipment, good will, accounts receivable and so on. There is no mention of the conveyance of the trade mark which I did not have at that time.

Q. Do you see any reservation of any kind on any limitation in the right of the corporation to sell and distribute [326] products bearing the name "International"? A. No.

Q. Now, Mr. Turk—by the way, I believe when you testified in Chicago you told us that that wasn't the case, didn't you? I asked you if you didn't testify as follows, on page twelve: Question: "By

(Testimony of Richard H. Turk.)

turning over all of the assets of the business that you had previously conducted, didn't you?" Answer: "I did not." Question: "And that was so specified in the minutes that you yourself signed, isn't it?" Answer: "It was not".

Now, you know now that it was, don't you?

A. I never saw these minutes but about one minute along with other things Mr. Schaefer had me sign. They were signed and I moved out of his office in about two minutes.

Q. Now, Mr. Turk, you had no trouble at all of any kind with Mr. Hughes in conducting this business until the summer of 1943, or the fall, did you?

A. What trouble occurred in the fall of 1943?

Q. I say, you had no trouble at all and your relationship was pleasant? You found nothing heinous about him until the summer of 1943?

A. Mr. Hughes had entire charge. I never looked at a book. I never had anything to find fault with.

Q. That is what I say. You found no fault with him and had no difficulties with him until 1943?

[327] A. That is right.

Q. And that is the time that you went back to Chicago?

A. That is right.

Q. And when you got back to Chicago you diverted the whole flow of the business being transacted in states other than Washington and Oregon away from the Washington corporation, didn't you?

(Testimony of Richard H. Turk.)

A. That was my business and had been all the time.

Q. I say, you diverted that business at that time?

A. I didn't need Mr. Hughes' permission. He couldn't object because it was my business.

Q. If you will— —

Mr. Boldt: I don't want to debate with the witness.

The Court: Try to answer the questions, Mr. Turk.

The Witness: What is it again, please?

Q. (By Mr. Boldt): You diverted all of the business from the States other than Washington and Oregon away from the Washington corporation, didn't you? A. Yes; I did.

Q. And you repeatedly mentioned in the letters that we read Friday that the reason you did it was first because of bookkeeping and secondly because it would help out on the [328] tax liability, but you repeatedly said in those letters that you intended to reimburse Mr. Hughes and the Washington corporation for the loss it would sustain by your doing that, didn't you?

A. That is a mistake on your part. There are several different things that you are mixing up, Mr. Boldt.

Q. Let me ask you, did you ever, or your concern in Chicago ever reimburse the Washington corporation for any of the excess charges that you made on the shares of the profits in the business other than Washington and Oregon.

(Testimony of Richard H. Turk.)

A. Limit it to one thing and I can answer. Don't mix two things in one.

Q. Mr. Turk, prior to the time that you went to Chicago, as the journal record shows, you were paid from month to month a certain commission amounting to twenty per cent on the business outside of the states of Washington and Oregon, weren't you?

A. I got paid—put it this way—on all business outside of Oregon and Washington—it was my business—and, for instance, if it came in from Montana——

The Court: The question is, did you get paid that sum; yes or no?

The Witness: I would say no; it is incorrect.

Q. (By Mr. Boldt): Then these books are incorrect? [329]

A. Those books are incorrect, and I would like to say that in evidence. It has been altered.

Q. Let me ask you this. Did you or did you not receive monthly, throughout this period, allowances to you in the way of commissions on business outside of the states of Oregon and Washington?

A. I got an allowance commission later. That was to simplify bookkeeping.

Q. On the books of the company you were allowed credit for commission on business outside of the states of Washington and Oregon?

A. Originally that wasn't true. The first year it was on a different basis.

(Testimony of Richard H. Turk.)

Q. Eventually you did?

A. Eventually I did; yes.

Q. And in May, 1943, appears to be the last time that any such allowance was made. Have you examined the books to verify that?

A. That would have to be true; yes.

Q. And that is the time you went to Chicago; isn't it?

A. That is right.

Q. And when you got back to Chicago you sold everything direct to these people in other states?

A. That is right.

Q. So that there was no instance for the Washington [330] corporation to allow you a commission because they weren't doing the business?

A. That is right.

Q. Is it your contention that the Washington corporation didn't realize any benefit from having sold among the Western states?

A. They didn't in reality. I sold and they kept the books for me.

Q. Didn't you realize a substantial income from that?

A. According to Mr. Hughes they didn't make anything on it in his letter.

Q. What is your story on it?

A. That was my business.

Q. What?

A. That was my business. It never belonged to the Washington corporation at any time.

Q. Mr. Turk, didn't Mr. Hughes repeatedly complain about that?

(Testimony of Richard H. Turk.)

A. He did not. Not authoritatively, because he had no basis.

Mr. Boldt: That is all, your Honor.

Mr. Snow: I think, since there has been so much reference to it, we should offer this.

Mr. Boldt: I have no objection.

Mr. Snow: You have no objection? [331]

Mr. Boldt: It makes no difference.

Mr. Snow: I think you better make it the Defendant's so that it will be returned to them.

The Court: Yes, and it will be admitted.

The Clerk: Defendant's Exhibit A-13 marked for identification and admitted.

(Document referred to marked Defendant's Exhibit Number A-13 for identification, and received in evidence.)

The Court: How long will it take you?

Mr. Snow: There are more than a few questions.

The Court: Court will be at recess until one-thirty.

(Whereupon, at 12:00 o'clock noon, January 17, 1949, a recess was had until 1:30 o'clock p.m., January 17, 1949.)

(Counsel heretofore noted being present, the following proceedings were had.)

The Court: You may proceed.

Redirect Examination

Q. (By Mr. Snow): Mr. Turk, will you please

(Testimony of Richard H. Turk.)

tell the Court why you didn't believe it necessary to enter into any formal contract with Mr. Hughes or Mr. Soper?

A. Because I was well acquainted with them and I trusted them implicitly. [332]

Q. I didn't hear. Will you raise your voice?

A. I was well acquainted with them and trusted them absolutely.

Q. Did either of them at any time prior to July 1, 1944, give you any reason not to trust them? For their honesty and so on?

A. No; I had no reason to doubt them.

Q. Throughout the course of the trial the name of Wyatt has come forth. Will you tell the Court the name of the firm he operates under?

A. International Electric Fence Company.

Q. And where is Mr. Wyatt located?

A. Parma, Idaho.

Q. How long has he been using that name?

A. Since some time in 1939.

Q. Did you have any dealings with Mr. Wyatt in 1939?

A. Mr. Wyatt was one of my distributors.

Q. At that time did you have a firm known as International Electric Fence Company?

A. I did.

Q. Who suggested to Mr. Wyatt that he use that name?

A. Oh, I don't know whose suggestion it was. I think that he decided to use it in order to gain additional prestige. [333]

(Testimony of Richard H. Turk.)

Q. Now, throughout the course of this examination the matter has been raised on the same basis as Wyatt and Klint. What did you mean by that, Mr. Turk?

A. That would be a sales franchise to sell International products in a given territory at a distributors price, fifty per cent over list in that case.

Q. Did Mr. Wyatt and Mr. Klint operate under a fifty per cent of the list price figure?

A. Yes; they both did.

Q. What was the figure under which International Electric Fence Company operated before October 9, 1949—1941?

A. They operated at my cost price, which was a figure considerably less than the other distributors paid.

Q. What was the figure that was used by the International Electric Fence Company after October 9, 1941?

A. It varied according to the model. The unit they enjoyed the largest sales on was the 106 and that was seven dollars early in 1941; raised to seven-fifty.

Q. At that time, in 1941, when you said that the early figure was seven dollars, what was the figure that Mr. Klint was paying for these? Pardon me, Mr. Wyatt?

A. Ten dollars.

Q. What was he paying when you had the later figure of seven-fifty? [334]

A. Ten dollars.

Mr. Snow: Will the Clerk please mark a letter

(Testimony of Richard H. Turk.)

written on International Electric Fence Company, Vancouver, letterhead, dated May 23, 1944, as Plaintiff's Exhibit Number——

The Clerk: Plaintiff's Exhibit Number 26 marked for identification.

(Document referred to marked Plaintiff's Exhibit Number 26 for identification.)

Mr. Snow: Number 26 for identification.

Q. (By Mr. Snow): Mr. Turk, I hand you Plaintiff's Exhibit Number 26, so marked for identification, and ask you if there is anything in that letter that relates to Mr. Hughes—first, excuse me.

Mr. Snow: Your Honor, the Defendant stipulates that they have no objection to the introduction of this exhibit in testimony.

The Court: Very well.

(Plaintiff's Exhibit Number 26 for identification received in evidence.)

PLAINTIFF'S EXHIBIT NO. 26

[Letterhead] International Electric Fence Co.

May 23d, 1944.

Mr. R. H. Turk,
910 West Van Buren St.
Chicago, Ill.

Dear Mr. Turk:

I am inclosing a letter from James A. Elliott of Astoria which explains itself insofar as the subject of this letter is concerned. This only illustrates

(Testimony of Richard H. Turk.)

what I have been saying heretofore, with which I am sure you do not disagree, that we must do all possible to eliminate our fencer troubles so that our customers will be better satisfied. There is entirely too much chopper and transformer troubles, also light bulbs. There are any number of dealers, as well as users, which are getting more and more peeved and disgusted about so many returns. They all say it hurts business, and we know full well they are right. I wrote Mr. Soper some days ago along this same line so that he could do all he can to eliminate transformer troubles, quoting to him from the letter you have from the Evergreen Service Station, also from a former letter from this same Mr. Elliott. Please give these problems your serious attention to the end that we can improve our relations with both dealers and the ultimate user of International fencers. Otherwise this condition is going to handicap us seriously as soon as competition becomes keen again.

Please return this letter to us for our files. I am taking care of all these complaints to the best of my ability.

I had expected to see you again before you left for Chicago but you got away too soon for me. There is one idea which occurred to me after you left for California which I had expected to talk with you about. That is this: in the event you should, or should not, buy out Mr. Soper's interest why could we not simplify the questions we have

(Testimony of Richard H. Turk.)

had under consideration by my buying your, and Soper's, interest in this firm here, all this being on the most friendly terms, of course. In this way you could get your profits in the prices charged and instead of your paying me the commission referred to in our conversations this would be a part of your profits instead of mine. I do not see why this could not be worked out to our mutual advantage.

We could run each business as best we could and avoid any misunderstandings as to business policy, also could save a considerable sum in taxes which should be worth considering. I assume I would then be on about the same basis as Wyatt and Klint, unless you wished me to go ahead with handling all the states considered in our conversations. Give this your careful consideration and let me know what you think of the suggestion.

I did not get away this morning but expect to tomorrow morning. Will be here over the week-end before leaving for southern Oregon.

Sincerely,

/s/ GEO.

Q. (By Mr. Snow): Is there anything in that testimony where Mr. Hughes indicates to anybody else that he knows of Mr. Wyatt's basis for operating. A. Yes, he says here——

Q. Who is the letter addressed to, first, Mr. Turk?

(Testimony of Richard H. Turk.)

A. It is addressed to me in Chicago and dated May 23, 1944. It states here. "I assume I would then be on about the same basis as Wyatt and Klint, unless you wished me to go ahead with handling all the states considered in our conversations."

Q. Is there anything in that letter that states that Mr. Hughes knew that Mr. Soper——

Mr. Boldt: Your Honor——

The Court: I will have to sustain the objection. That would call for his conclusion.

Mr. Snow: Pardon me.

Q. (By Mr. Snow): Mr. Turk, will you please read an extract from that letter wherein the name Soper is used?

A. "I had expected to see you again before you left for Chicago but you got away too soon for me. There is one idea which occurred to me after you left for California which I had expected to talk with you about. That is this: In the event you should, or should not, buy out Mr. Soper's interest why could we not simplify the questions we have had under consideration by my buying your and Soper's interest in this firm here, all this being on the most friendly terms, of course. In this way you would get your profits in the prices charged and instead of paying me the commission referred to in our conversations this would be a part of your profits instead of mine." [336]

Q. Mr. Turk, on the stand yesterday his Honor asked you when you left here for Washington

(Testimony of Richard H. Turk.)

(Chicago) and you stated in 1943, and then the next question was how long had you lived here, or something like that. Will you tell the Court how long you have been a resident of the state of Washington?

Mr. Boldt: You said, "here for Washington." You misspoke yourself.

Q. (By Mr. Snow): Will you please tell the Court how long you were a resident of the state of Washington before you left for Illinois?

A. With the exception of five years spent in California, I have at that time lived in Washington from January 1902; probably in the neighborhood

Q. Until—— A. Until 1943.

Q. That is about your age, isn't it, Mr. Turk?

A. Yes. In other words, I have spent my life in Washington practically.

Q. Now, on cross-examination you answered Mr. Boldt's question, when was the first time you used the word "International" on an electric fencer and you stated that it was March, 1938. Is that answer correct or not?

A. Well, that statement is incorrect. [337]

Q. Will you please correct that statement?

A. Mr. Mitchell had made preliminary units as early as July 1937 and Mr. Soper had come to Portland in about August of 1937 and we were working together to form this company and get our product into readiness and our first trade mark

(Testimony of Richard H. Turk.)

unit was submitted to Mr. Good approximately December of 1937, I would say.

Q. Where was Mr. Good located?

A. In Clark County.

Q. And where were you located?

A. In Portland, Oregon.

Q. Did that unit have the trade mark "International"? A. Yes.

Q. December, 1937; now is that correct?

A. Yes, and we had earlier models of it but they were not trade marked.

Q. So that you wish to correct the answer given to Mr. Boldt? A. I do.

Q. Did you have any trade mark rights of your own in the word "International" on October 9, 1941?

Mr. Boldt: If your Honor please, I think we have gone over that sufficiently.

The Court: Yes, we covered that pretty much. He said he did not have. [338]

Mr. Snow: Fine. As long as your Honor understands that. I wanted to be sure.

Mr. Boldt: He said he had the right to sell and distribute the product under that name.

The Court: Yes. I think I want to ask a question or two. I think it is probably covered but I want to repeat—you say you had no rights in this trade mark in 1941?

The Witness: I transferred those to Soper earlier.

(Testimony of Richard H. Turk.)

The Court: You had the original rights to this name?

The Witness: I imagine I did; yes.

The Court: And when you say you transferred them to him because he went into the manufacturing business——

The Witness: That is right; the rights went to the manufacturing.

The Court: And you and he dissolved your venture out here?

The Witness: That is right.

The Court: And how did you transfer it? He just went back there and started to make units and put the label on them?

The Witness: He didn't start making units as soon as I did but his facilities for manufacturing were far [339] superior to mine.

The Court: Did you make units out here after 1941?

The Witness: Oh, no. I quit.

The Court: How did you transfer it then?

The Witness: By letter. By agreement. When I got the sales agreement I turned my right to manufacture over to Soper and took instead——

The Court: Do you have some written document on that or was that an understanding?

The Witness: Just an understanding and correspondence. In other words, I transferred to him the right to manufacture and I got——

The Court: What did he give you?

(Testimony of Richard H. Turk.)

The Witness: The sales franchise for the Western states.

The Court: Was that in writing?

The Witness: Only in correspondence.

The Court: And when did he transfer it back to you?

The Witness: When I purchased the business. You see, I acquired half of it in 1943 when I bought an interest in International Electric Company.

The Court: Was that an Illinois corporation or a co-partnership?

The Witness: That was Soper's individually until [340] I bought an interest in June, 1943.

The Court: And then did you organize a corporation?

The Witness: No; not then.

The Court: You were just partners?

The Witness: Just partners for one year.

The Court: And did he give you anything in writing showing his transfer back to you?

The Witness: He transferred all the assets.

The Court: Did he give you anything in writing?

The Witness: Yes; that was in writing.

The Court: Did it mention the trade name?

The Witness: It didn't specifically mention the trade mark.

The Court: That is all.

Q. (By Mr. Snow): Mr. Turk, I hand you Defendant's Exhibit A-12, and ask you if there is

(Testimony of Richard H. Turk.)

anything on that to show, is there anything on that exhibit except physical assets?

A. Only one item, that is \$1.50 per unit on the units unsold.

Q. That is a forty-seven hundred dollar item, isn't it?

A. That is a forty-seven hundred dollar item which is only a fraction of as much as if I had retained my interest [341] in the corporation. That should have been two-fifty a unit but because it was a cash consideration and I could use it and I figured it would be pretty hard for him to produce them I cut it down to one-fifty.

Q. Is there anything on that sheet to indicate that you were getting credit for any good will and any trade mark that you owned?

Mr. Boldt: If your Honor please—

The Court: I will sustain the objection.

Mr. Snow: Is that on the theory that the instrument speaks for itself?

The Court: No, it is on the theory that when he sold his stock whatever the corporation had it continued to have. There is no contention made here that he owned the trade name at the time that he transferred the stock back. The contention is—the issue is—did the corporation have it by virtue of what occurred when it was organized. The Defendant does make the contention that he bought the trade name or any interest in it when he bought the plaintiff's half interest in the corporation.

(Testimony of Richard H. Turk.)

Q. (By Mr. Snow): Mr. Turk, I hand you Defendant's Exhibit A-7—

The Court: However, if there is anything in that that refreshes his memory in that he made a reservation, that would be highly material. [342]

Mr. Snow: I don't believe there is, your Honor.

Q. (By Mr. Snow): I hand you Defendant's Exhibit A-7 and ask you whether you were present when that instrument was made up?

A. I was not.

Q. Do you know who wrote that instrument?

A. Mr. Schaefer drew it up.

Q. Did you read that instrument before you signed it? A. No.

Mr. Boldt: If your Honor please—

The Court: I think it is repetition. He said he didn't. It is for the Court to determine whether he knew it or not.

Mr. Snow: I am sorry, your Honor, I didn't realize he said that.

The Court: That was on direct and cross-examination.

Mr. Snow: Fine.

Q. (By Mr. Snow): I don't believe, however, that you have testified as to what occurred on the day that the minutes were signed in Mr. Schaefer's office, did you, and if not, what did you say? What happened?

A. The papers were already drawn up and Mr. Hughes and [343] I ran down there and signed the papers and left immediately.

(Testimony of Richard H. Turk.)

Q. What papers now are you talking about?

A. All the papers in connection with the formation of the corporation.

Q. There were more than just that one?

A. Oh, yes, quite a few. I imagine there were—this apparently is a later date than the other papers.

Q. I hand you Defendant's Exhibit A-13 and ask you whether or not——

The Court: Wasn't there introduced in evidence a cancelled check for two thousand dollars?

Mr. Boldt: No, it was not, your Honor.

The Court: Was it identified?

Mr. Boldt: No. It was agreed that it was paid and he acknowledged receipt of it.

The Court: What I am interested in was the date as compared with the articles of incorporation.

Mr. Boldt: I don't know that the exact date has been developed.

Q. (By Mr. Snow): Did you ever have an occasion to have an auditor come in to check Mr. Hughes' books?

A. Mr. Hughes' books were never audited from the time he first started to work for me and had not been audited when I sold out. I trusted him absolutely. [344]

Q. And you say you sold out in—from the time you began—that means from the period 1940 when he first became an employee of yours until July 1, 1944?

A. That is correct.

(Testimony of Richard H. Turk.)

Q. And I believe you said the reason was that you trusted him implicitly; is that correct?

The Court: He has covered that.

A. Yes.

Q. (By Mr. Snow): Mr. Turk, I want you to look at that journal, especially the first page thereof, and tell the Court whether there are any opening entries in that book to indicate how the business started and where it got its money?

A. There are no opening entries, no. I would say there are no opening entries.

Q. You made a statement on the stand to Mr. Boldt that you thought there was something wrong with the entries in that book. What did you mean by that, Mr. Turk?

Mr. Boldt: Is it material?

Mr. Snow: I think it is very material.

The Court: He may answer.

A. Well, I noticed immediately when I got a look at this book the other day—it was the first time I have seen it in a long, long time—that there are alterations here that materially affect this. At the beginning I reserved [345] these other states and I was not on a commission basis from this corporation.

The Court: We don't care to go over that again. Is there an entry in the book or minutes that you made a reservation and if it be taken out——

The Witness: It has been taken out. I can show you, your Honor.

(Testimony of Richard H. Turk.)

The Court: Tell us what page.

The Witness: Page twelve, dated February 9th, of the year 1942, and it shows a commission, twenty per cent commission, has been made over the original entry and it shows \$202.15 commission. Actually, I had deducted from those particular invoices \$260.00 which was the amount that I kept for myself and the balance of it went into the corporation to handle the freight, the repairs and the book-keeping.

The Court: Very well.

Q. (By Mr. Snow): Mr. Turk, did you ever work for any other company during the period of '41, '42, '43 or '44 besides International Electric Fence? A. Yes——

Q. Wait a minute. A Washington corporation or the International Electric Company, a co-partnership in the state of Illinois? Would you like me to repeat that? [346] A. Yes, please.

Q. Did you ever work for any other organization in '41, '42, '43 or '44 other than the Washington corporation, International Electric Fence Company, a corporation, or International Electric Fence Company of Chicago, a co-partnership?

A. Yes, the sales representative on the West Coast for the Wisconsin Fork Company?

Q. What time was that? A. About 1940.

Q. Who handled the books on those items?

A. International Electric Company, Inc. when

(Testimony of Richard H. Turk.)

it became a corporation and before that, Mr. Hughes.

Q. Did you ever pay Mr. Hughes for that?

A. No.

Q. Did he receive any compensation for handling those accounts?

A. The only compensation that the corporation got in Vancouver was a storage charge. They were paid, I think, fifty cents a thousand for storing the insulators.

Q. If that was your personal account wouldn't Mr. Hughes be entitled to some personal compensation for handling that?

A. The corporation, of course, benefited by having a supply of insulators on hand for taking care of all accounts [347] and had no money invested in the insulators.

Q. Were those insulators for making fences—

A. Yes.

Q. To which your unit was attached?

A. That is right. And I would say that—well, I forget my train of thought.

Q. The corporation or Mr. Hughes did not receive any compensation for handling those accounts?

A. Pardon me, I remember. The invoices, the insulators, were billed or assigned to International Electric Fence Company, but the corporation did not receive any of the commissions. It was my business. It is one of the reservations I made.

(Testimony of Richard H. Turk.)

Q. Mr. Turk, on your cross-examination you were asked about a thirteen thousand dollar overcharge that you were supposed to have made to Mr. Hughes and I believe you testified on direct examination that you sent him a credit memorandum for that thirteen thousand dollars overcharge shortly after the charge was made; is that correct or incorrect? A. That is correct.

Q. Do you have that credit memorandum with you? A. Yes.

Q. Will you please get it?

Mr. Boldt: There isn't any question about it. He [348] made an overcharge in that amount and later turned it back.

Mr. Snow: I want the dates.

Mr. Boldt: All right.

Mr. Snow: Your Honor, counsel for Defendant states that he will admit that a credit memorandum was issued for that alleged thirteen thousand dollars they have been talking about for the last couple of days.

Mr. Boldt: Let's be more specific. This has nothing to do with the sale of stock. That is an entirely different situation. We have referred to another sum of thirteen thousand odd dollars several times, but this is not the same transaction. This transaction you are referring to is one where Mr. Turk undertook to increase the prices on items he had previously furnished the Vancouver corporation to the extent and total of about thirteen thousand dollars. Mr. Hughes refused to pay it and finally he credited it off and cancelled that excess

(Testimony of Richard H. Turk.)

charge. That has nothing to do with the purchase of stock. So that there will be no confusion about it. Do you understand it that way?

Mr. Snow: I understand it explicitly.

The Court: Why don't you agree——

Mr. Snow: Because of the immuendoes and because there will be more evidence anyway should we *got* into the unfair competition and I want——

The Court: Very well. Let it be marked and admitted. [349]

The Clerk: Plaintiff's Exhibit Number 27 marked for identification and admitted.

(Document referred to marked Plaintiff's Exhibit Number 27 for identification and admitted in evidence.)

PLAINTIFF'S EXHIBIT NO. 27

International Electric Fence Company
910 West Van Buren Street, Chicago, Ill.

No. 564

Date July 13, 1944

Credit International Electric Fence Co.

2215 Main St., Vancouver, Wash.

We Credit Your Account

Description	Invoice No.	Amount
Total of Invoice.....	#2970	\$ 4,762.50
Total of Invoice.....	2971	2,970.00
Total of Invoice.....	2972	5,395.25
*10.00		13,127.75
*7.50		*29,826.47
		*42,954.22

Credit Memo

*Printed form filled out in pencil.

*These figures are in pencil.

INTERNATIONAL ELECTRIC FENCE CO.

By /s/ T. T. QUIRAM

(In duplicate)

Admitted Jan. 17, 1949

(Testimony of Richard H. Turk.)

International Electric Fence Company
910 West Van Buren Street, Chicago, Ill.

No. 565

Date July 13, 1944

Credit International Electric Fence Co.

Vancouver, Wash.

We Credit Your Account

Description	Invoice No.	Amount
Your Invoice	#6503	12.50
Your Invoice	6502	261.25
Your Invoice	6500	110.00
Your Invoice	6499	275.00

658.75

INTERNATIONAL ELECTRIC FENCE CO.

By /s/ T. T. QUIRAM

Credit Memo

International Electric Fence Co.

Invoice

910 West Van Buren Street, Chicago, Ill.

No. 2972

Sold To: International Electric Fence Co., 2215 Main Street, Vancouver, Washington.

March

Undercharge on invoices	Quantity	Unit	Billed at	Should be	Under-charge	
*3- 2	2742	170	106	1,275.00	1,700.00	425.00
3- 4	2747	80	"	600.00	800.00	200.00
3- 7	2754	148	"	1,110.00	1,480.00	370.00
3- 7	2757	110	"	825.00	1,100.00	275.00
3- 9	2759	205	"	1,537.50	2,050.00	512.50
3-14	2766	31	"	232.50	310.00	77.50
"	60	AD/31	420.00	555.00	135.00	
3-16	2776	200	"	1,400.00	1,850.00	450.00
3-20	2780	100	106	750.00	1,000.00	250.00
3-21	2789	70	"	525.00	700.00	175.00
"	80	AD/31	560.00	740.00	180.00	
3-22	2792	170	106	1,275.00	1,700.00	425.00
3-23	2793	200	"	1,500.00	2,000.00	500.00
3-24	2807	25	400	175.00	231.25	56.25
3-24	2810	80	106	600.00	800.00	200.00
"	36	AD/31	252.00	333.00	81.00	
"	48	400	336.00	444.00	108.00	
3-27	2822	230	106	1,725.00	2,300.00	575.00
"	2825	130	"	975.00	1,300.00	325.00
3-29	2826	30	106	225.00	300.00	75.00
				†16,298.00		5395.25

*This column is written in pencil.

†The total for this column in pencil.

Date Shipped

By R. H. TURK

(In duplicate with exceptions as noted above.)

(Testimony of Richard H. Turk.)

International Electric Fence Co.
910 West Van Buren Street, Chicago, Ill.

2971

Invoice

Sold To: International Electric Fence Co., 2215 Main Street, Vancouver, Washington.

February

Undercharge on invoices

	No.	Quantity	Unit No.	Billed at	Should be	Under-charge
*2- 1	2653	180	106	1,350.00	1,800.00	450.00
2- 5	2661	112	"	840.00	1,120.00	280.00
2- 5	"	72	AD/31	504.00	666.00	162.00
2- 7	2667	144	"	1,008.00	1,332.00	324.00
2-10	2674	100	106	750.00	1,000.00	250.00
2-12	2681	80	"	600.00	800.00	200.00
2-15	2689	120	"	900.00	1,200.00	300.00
2-16	2690	100	"	750.00	1,000.00	250.00
2-21	2706	72	AD/31	504.00	666.00	162.00
	"	12	411	126.00	159.00	33.00
2-24	2718	50	500	525.00	662.50	137.50
2-26	2724	20	106	150.00	200.00	50.00
	2735	100	"	750.00	1,000.00	250.00
2-28	"	54	AD/31	378.00	499.50	121.50
			†Batt.			
	†72		units 6.00	†432.00		
				†		
				†9567.00		2,970.00

*This column is written in pencil.

†These figures and notations are in pencil.

(In duplicate with exceptions as noted above.)

International Electric Fence Co.
910 West Van Buren Street, Chicago, Ill.

Invoice

No. 2970

Sold To: International Electric Fence Co., 2215 Main Street, Vancouver, Washington.

January

Undercharge on invoices

	No.	Quantity	Unit No.	Billed at	Should be	Under-charge
*1914						
*1- 4	2587	96	106	720.00	960.00	240.00
1- 6	2595	272	"	2,040.00	2,720.00	680.00
1- 8	2606	72	"	540.00	720.00	180.00
1- 8	2601	106	"	795.00	1,060.00	265.00
1-12	2606	112	"	840.00	1,120.00	280.00
1-12	2612	336	AD/31	2,352.00	3,108.00	756.00
1-18	2618	144	106	1,080.00	1,440.00	360.00
1-19	2620	139	106	1,042.50	1,390.00	347.50
1-20	2630	84	"	630.00	840.00	210.00

(Testimony of Richard H. Turk.)

Undercharge on invoices		Quantity	Unit No.	Billed at	Should be	Under-charge
*1944	No.					
1-21	2633	174	AD/31	1,218.00	1,609.50	391.50
1-25	2642	266	106	1,995.00	2,660.00	665.00
1-26	2646	155	106	1,162.50	1,550.00	387.50
				†14,415.00		4,762.50

*This column of figures are written in pencil.

†This total is written in pencil.

Date Shipped

By R. H. Turk.

(In duplicate with exceptions as noted above.)

Mr. Snow: That will be all.

Recross-Examination

By Mr. Boldt:

Q. My statement that I just made about this last transaction is correct, isn't it, Mr. Turk?

A. This had nothing to do with the sale at all.

Q. Yes. A. That is right.

Mr. Boldt: That is all.

(Witness excused.)

Mr. Snow: Now, your Honor, if I may, I would like to introduce in evidence the Soper deposition. It has been on file here and if your Honor has read it, I would be perfectly willing to waive the reading of it.

The Court: Was the deposition taken in the presence of the Plaintiff?

Mr. Boldt: Yes.

The Court: I think it should be read into the record. [350]

Mr. Boldt: I thought to save time, if your Honor has read it—

The Court: I have read it, but I would like to have it in the record again.

Mr. Snow: I think it would be better the other way around, since I am questioning here.

The Court: Either way.

Mr. Snow: "The deposition of Mr. Vernard Soper, taken on Monday, December 20, 1948, at the law offices of Rummmler, Rummmler and Snow, Suite 740, 7 South Dearborn Street, Chicago, Illinois _____,"

The Court: You need not read that. It will be stipulated.

Mr. Boldt: Yes.

Mr. Snow: It will be stipulated; thank you.

Mr. Snow: This deposition is taken pursuant to notice. All objection excepting as to form are reserved for the trial.

Mr. Boldt: That is agreeable.

Mr. Snow: May we stipulate at this time that the deposition may be taken stenographically, and later typewritten, and the witness need not read and sign, signature is waived?

Mr. Boldt: It is so stipulated.

(Whereupon, the following deposition was read.) [351]

VERNARD SOPER

a witness produced on behalf of the Plaintiff, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, upon oral interrogatories, deposed and testifies as follows:

Direct Examination

By Mr. Snow:

Q. Will you please state your name, age, residence, and occupation?

A. My name is Vernard Soper; my residence is Minneapolis, Minnesota; and my business is manufacturing.

Q. What is the nature of your business; what is the corporate name, or firm name—or what is it, please?

A. The name of my business is the Electric Service Systems, Inc.; and we manufacture sheet metal products, electrical products, such as electric fence controllers, battery chargers, and display racks for fencing, and other items; and we do fabricating of steel products.

Q. How long have you been in this business?

A. I have been in this particular business of the Electric Service Systems since June, 1943; and at that time we manufactured exclusively electrical products, primarily electric fence controllers and stock prods; and also manufactured transformers.

Q. Calling your attention to the year 1938, were you [352] in the business of manufacturing these electric fence controllers that you have just testified to?

(Deposition of Vernard Soper.)

A. We were in the manufacture or assembly of—I should say assembly of electric fence controllers, yes; we were beginning the assembly of them.

Q. Not manufacturing?

A. Not in the term that we fabricated and made all the parts; we bought the parts and assembled all the units.

Q. You said “we”; whom do you mean by we?

A. I should have said the company; I should have said I did, that would be the proper term to use.

Q. We are talking about 1938 the company consisted of a corporation that was incorporated in the state of Oregon; it was formed by Richard Turk and his wife and myself and my wife—I think that is incorrect; I believe it was just Mr. Turk and myself, and an attorney by the name of Shively, I believe; and Mr. Turk and I had all the shares except one, which this Mr. Shively had to act as a third member in the corporation.

Q. What was the purpose of this company, Mr. Soper?

A. This company was formed with the intention of selling electric fence controllers over the United States and Canada, and also to export when opportunity permitted.

Q. Where was this corporation located?

A. At Portland, Oregon. [353]

Q. And what was the name of it?

A. International Electric Fence Company, Inc.

(Deposition of Vernard Soper.)

Q. You mentioned the name Mr. Turk; which Mr. Turk is that?

A. That is R. H. Turk, or Richard H. Turk.

Q. When did you first become acquainted with him?

A. I became acquainted with Mr. Turk personally in August of 1936.

Q. Was that acquaintanceship as the result of business dealings, or of a friendly nature?

A. That was business dealings; we were both selling for an electrical fence company, of Fayette, Idaho. I was Sales Manager for that Company at the time, and he represented the Company in California.

Q. What was the name of that Company?

A. Electro Fence Company; but they also used the word Richards Electro Fence Company; so I presume it would be better to definitely state that it was Richards Electro Fence Company.

Q. What were they doing?

A. They were manufacturing or assembling electric fence controllers; and we sold them. I should say we, Dick and I. Of course, there were other outlets that I had established throughout the United States, similar to Mr. Turk.

Q. You used the word Dick; to whom did you refer? [354]

A. That is Mr. R. H. Turk.

Q. Calling your attention again to the year 1938, when you stated you and Mr. Turk organized a

(Deposition of Vernard Soper.)

corporation known as the International Electric Fence Company, an Oregon corporation, for the purpose of—would you mind repeating the answer to that question; what was the purpose of that corporation?

A. It was to sell electric fence controllers at that time; that was what it was established for—to merchandise the electric fence controllers.

Q. Were you going to manufacture them, or distribute them?

A. We had another gentleman who was going to manufacture them for us; but it was our intention later to take over production also.

Q. What happened to that corporation?

A. Due to the inability of the producers of our electric fencers to make a product that would stay sold, we found it necessary to discontinue purchasing his products; and Mr. Turk moved to Vancouver, Washington, and rebuilt the controllers we had bought from our former producer; and in the meantime I had come to Chicago, and it was agreed through the mails that I would start to produce the electric fence controllers here also.

Q. Now, Mr. Soper, would you be just a little more [355] specific in your answers, so as to avoid asking these questions on repetition, more or less?

A. Yes.

Q. You stated the words “his products,” referring, I believe, to some manufacturer.

A. Yes; that was the gentleman that was going

(Deposition of Vernard Soper.)

to produce for us, that was a Mr. Mitchell; I have forgotten his name.

Q. You used the expression "stay sold"; what did you mean by that?

A. His product was not satisfactory; they were returned to us because of their inability to perform as they should.

Q. You stated that Mr. Turk moved to Vancouver and you came to Chicago; would you mind stating specifically or approximately the time element involved here?

A. To clear that up, I came to Chicago in the spring, it was in April of 1938, with the intention of selling the products made by Mr. Mitchell. At that time Mr. Turk continued in the office at Portland, Oregon; but later in the summer, I believe it was in August or thereabouts, it was absolutely necessary that we discontinue buying these products from Mitchell; and Mr. Turk found it best to move to Vancouver, to cut his expenses, and to assemble, reassemble, I should say, and rebuild the merchandise which [356] we had bought from Mr. Mitchell.

During this month of August it was quite evident that it would be to our best advantage for me to manufacture our electric fence controllers in Chicago also.

Q. By the expression "we," whom do you mean?

A. That was Mr. Turk and myself.

Q. You stated that you moved to Chicago in

(Deposition of Vernard Soper.)

August, 1938, for the purpose of assembling and selling electric fencers; did you have a name under which you did business?

A. I would like to make a correction there, sir.

Q. Surely.

A. I came to Chicago in the spring; I believe it was April of 1938.

Q. You are right, you said spring. I am sorry. It was August when Mr. Turk moved to Vancouver, Washington.

Read the preceding question.

(Preceding question read by the Reporter and Notary.)

The Witness: We used the name International Electric Fence Company, the term "we" being Mr. Turk and myself. And it was not until August, as stated before, that we decided that it would be necessary for us to produce our own product, to get a satisfactory item on the market.

Q. Mr. Soper, throughout your testimony, where it has not been corrected, you have used the words "we" up to this point; "we" in your testimony referred to whom? [357]

A. Mr. Turk and myself.

Q. Throughout, up to this point in your testimony?

A. Yes, I believe that is correct; unless I might have said "we" in the very beginning on something. But it all means Mr. Turk and myself, I am quite sure of that.

(Deposition of Vernard Soper.)

Q. Calling your attention to the fall of 1939, will you please tell us what happened at that time, in connection with this business?

A. The fall of 1939,—I believe it was 1939 that Mr. Turk and myself decided it would be to the advantage of the Company if I did the production, took over the production of electric fence controllers in Chicago, and he took over the sales of the product of the West Coast. This action was taken because Mr. Turk was already familiar with the jobbers and dealers on the West Coast, and it would be easier to establish our outlets, and less expensive, than it would for me to try to establish outlets here in the Middle West.

Q. You said that Mr. Turk decided this and Mr. Turk decided that; how did you know that?

A. Mr. Turk and I had the correspondence back and forth, and that was our decision.

Q. In other words, the answer to the foregoing question is of your own knowledge and information?

A. Yes, sir. [358]

Q. Did you enter into any arrangement with Mr. Turk?

A. Well, that was our understanding that he would sell wherever he could and do the traveling; and I would concentrate on the manufacturing.

Q. You used the expression, Mr. Turk was going to sell; did he have any specific territory?

A. Well, not particularly at that time; it was anywhere out there that he could cover.

(Deposition of Vernard Soper.)

Q. What do you mean, out there?

A. From Vancouver, any territory that he could get a good salesman. It was generally accepted that he would sell from, oh, the Western States; because it was more easily accessible to him, and the shipments could be made directly to Vancouver and then disbursed to other States. Usually, we thought of it as from, oh, Wyoming, Colorado and the west.

Q. Did Mr. Turk forego anything in order to enter into this arrangement with you?

A. Well, he discontinued the production of fence controllers out there, or re-assembly of them, and handled just the sales of the merchandise I produced.

Q. Did you have any other distributors out on the West Coast at that time?

A. Well, only the ones that worked directly with him.

Q. By "him," that is Mr. Turk? [359]

A. Yes, Mr. Turk: I believe we did have one in Denver that I sold direct.

Q. Was this an exclusive distributorship that you turned over to Mr. Turk, or not?

A. Well, I presume you would call it that; because I always turned over all inquiries, and so forth, to him to be sold by Mr. Turk.

Q. What name were you operating under in Chicago?

A. Under the name of International Electric Fence Company.

(Deposition of Vernard Soper.)

Q. So that your answer now is that Mr. Turk has had an exclusive distributorship for the West Coast, with the exception of a few accounts in Denver, or one account in Denver, I believe you testified to?

A. Yes.

Q. How long did this arrangement continue?

A. This arrangement continued until June, 1943.

Q. What happened in June, 1943?

A. In June, 1943, Mr. Turk came back to Chicago, and we formed a partnership; and the partnership was formed by the purchase of the Electric Service Systems in Minneapolis by Turk and myself, and also by Mr. Turk, giving me a half of his one-half interest in the Vancouver office; and he also turned over to me accounts that he had in other States; that is, I should say he turned over to the Company here [360] in Chicago.

Q. You mentioned the Vancouver office; was that a corporation or a partnership?

A. That was incorporated in Washington, I believe, and owned exclusively by Mr. Turk and Mr. Hughes; that is, I am quite sure that is true.

Q. When you say one-half of his half of the Vancouver office, what do you mean by that?

A. Well, possibly a one-fourth interest in the business out there.

Q. Would that be in the form of stock?

A. Yes.

Q. Or capital assets, or what?

(Deposition of Vernard Soper.)

A. It was stock; and, I presume, everything that goes with that; but I assume that is stock, and would be a one-fourth interest in the business, in regard to dividing profits in the business, or in value.

Q. Do you recall how many shares of stock that was?

A. I believe it was one hundred shares.

Q. As a stockholder, now, in the Washington corporation, do you know what the name of that corporation was?

A. Yes; that was the International Electric Fence Company, Inc.

Q. Do you know what the prime asset of that corporation was, as a stockholder? [361]

A. Would you clarify that a little bit?

Mr. Boldt: Read the question again.

(Pending question read by the Reporter and Notary.)

The Witness: Well, the only thing that would be the merchandise, and the outlet, and the sales that they had in their possession, and the trade that was loyal to them.

Q. (By Mr. Snow): You have generally answered the question: Didn't the Vancouver office, or the Washington corporation known as International Electric Fence Company, Inc., have something of extreme value which was exclusive with that corporation?

A. Well, yes, they did; they had the outlets, the sales outlets, which were very important.

(Deposition of Vernard Soper.)

Q. By sales outlets, what do you mean by that?

A. Well, I mean the territory they were familiar with and were known in the field out there. And their greatest asset, I would say, would be in the sales in that territory, greater than their inventory, or such.

Q. Mr. Soper, do you know, of your own knowledge, being a stockholder in the Washington corporation, what the main asset of that corporation was?

A. Well, their turning over of electric fences. By that term I mean their sales was their great asset. It was the fact it was able to merchandise a lot of electric fence controllers, which in turn to me meant profits; and [362] their right to sell in that territory, or how you would term it. The big asset would be their ability to sell merchandise.

Q. Mr. Soper, you testified that prior to June of 1943 you manufactured and/or assembled and shipped electric fence controllers, and analogous equipment, to the International Electric Fence Company of Vancouver, Washington; did you ever ship any electric fence controllers to a Mr. E. A. Wyatt, of Parma, Idaho, and to Charles Klint, of Fresno, California?

A. Yes, sir.

Q. Your answer is that prior to June of 1943 you did that?

A. Yes, sir.

Q. Did you invoice those fencers to either Mr. Wyatt or Mr. Klint?

(Deposition of Vernard Soper.)

A. No, sir; I invoiced those to the Vancouver office.

Q. Why?

A. Well, that was the arrangement between the Vancouver office and myself; and any merchandise that was sold in that territory, they were responsible for the moneys.

Q. Do you know who this Wyatt and Klint firm are?

A. Yes; they are distributors, or were distributors for the Vancouver office of the International Electric Fence Company. [363]

Q. Now, subsequent to June 1, 1943, did you ever ship any electric fencers, controllers or analogous equipment, to the Wyatt firm and the Klint firm? A. Subsequently, you mean before?

Q. And after?

A. After, yes, I did; but they were shipped from the Minneapolis office of the Electric Service Systems.

Q. To whom did you invoice those shipments?

A. At that time Mr. Turk and I had formed the partnership, and I billed all the invoices to the Chicago office of the International Electric Fence Company.

Mr. Snow: Will the Reporter please mark this document as Plaintiff's Exhibit 1 for identification?

(Plaintiff's Exhibit 1 marked for identification by the Reporter and Notary.)

(Deposition of Vernard Soper.)

Q. (By Mr. Snow): I hand you Plaintiff's Exhibit 1, and ask you if you recognize that document?

The Witness: Yes; this is the agreement between Mr. Turk and myself, that was drawn in June, 1943; and it appears to be a duplicate of the original copy.

Q. Have you examined that copy, Mr. Soper?

A. Yes.

Q. Would you say that that is, as far as you are aware, an exact copy of the original of that document?

A. Yes, sir. [364]

Q. (By Mr. Snow): Will the Reporter please mark these labels as Plaintiff's Exhibits 2, 3 and 4 for identification?

(Plaintiff's Exhibit 2, 3 and 4 marked for identification by the Reporter and Notary.)

Q. (By Mr. Snow): I hand you Plaintiff's Exhibits 2, 3 and 4, and ask you if you can identify them?

The Witness: Well, this Exhibit 2 is the name plate used on the International Electric Fence Company products.

Q. From when to when?

A. Well, I would say from about 1943 up to the present date, as far as I know. There is a little variation in the portion right in back of the word "Approved" in this particular name plate. I don't know whether that is important, or not. But the general construction and the word International are

(Deposition of Vernard Soper.)

identical with those used from 1944, that I know of definitely.

Q. When in 1944?

A. From June of 1943 until about June of 1944.

Q. Will you go on?

A. And Exhibit 3 is a name plate that was used from 1939, I believe it was, up until 1944; and I believe it was continued after that date. This Exhibit 3 was our original metal name plate.

Exhibit 4 is a decal and that was used by someone other than myself. [365]

Q. Did you use one similar to that, Mr. Soper, in the conduct of your business as International Electric Fence Company?

A. Yes, we did; from 1940, or thereabouts, we used one similar to this in outline, except the words "Electric Company" used to be "Electric Fence Company."

Q. Was the name International written substantially the way it is there?

A. Yes; but the name International, in script and designed as it is here on Exhibit 4, is identical to all the names that we have used dealing with the company name of International.

Q. From then to when?

A. Well, from the very beginning, when we first conceived the company.

Q. When was that?

A. It was the spring of 1938.

(Deposition of Vernard Soper.)

Q. To when?

A. To 1944, when I no longer was with this company; but I know they continued to use the name, and in script.

Q. Calling your attention again to Plaintiff's Exhibit 2, I believe you testified that that label was used from June, 1943, until 1944, when you no longer were associated with Mr. Turk; was the name International as it appears on Plaintiff's Exhibit 2, and the general makeup of that label, used prior to June of 1943, to the best of your [366] knowledge and belief?

A. I don't believe it was; I think it was after 1943 that we adopted this diamond-shaped design. However, I cannot be certain of that; but the name International is the same on the metal unit. But the name Vancouver, Washington, and New York, New York, and Chicago, Illinois, was always used on our name plates up until about some time in 1943; I don't know just when that was, when we struck out the word New York, I believe; I may be wrong on that; but it was only a matter of a few months there, I believe, we struck out the word New York.

Q. Well, now, that statement is in direct contradiction of the statement that you made with reference to the decal, Plaintiff's Exhibit 4.

A. Yes.

Q. Which you say you used since you started in business in 1938; I am speaking now primarily

(Deposition of Vernard Soper.)

of the diamond shape. What was the shape of the decal you used in 1938?

A. I must correct myself in that, in that the metal plate was an elongated plate, and the decal was diamond shaped. There was a little difference there in design of the metal and the decal; that was the difference.

Q. Now, you mentioned that you discontinued in this business in 1944; would you mind explaining that?

A. Well, in 1944 Mr. Turk and I dissolved our partnership. [367]

Q. Do you know what month that was?

A. That was in June, I believe; I am pretty sure it was in June. And at that time we divided our interests in our combined business in this manner: I took the Electric Service Systems Company, Inc., up in Minneapolis, Minnesota. Mr. Turk took the Chicago office of the International Electric Fence Company. And I gave back to him the shares of the International Electric Fence Company, Inc., of Vancouver, Washington, that I owned, you might term it.

After that date, the International Electric Fence Company in Chicago belonged to Mr. Turk, as did a half interest in the Vancouver office of the International Electric Fence Company, Inc.; and I had full possession of the Electric Service Systems, Inc., of Minneapolis.

(Deposition of Vernard Soper.)

Q. When you mentioned that you turned over to Mr. Turk the International Electric Fence Company at Chicago, did that transfer include the goodwill, assets, and trademarks of the International Electric Fence Company, of Chicago?

A. Yes, it included everything, all the merchandise; and there was some little settlement on the side, as far as money was concerned. It turned over everything to him, but——

Q. Did you ever use the name International, or International [368] Electric Fence Company in connection with the sale and manufacture of electric fencers by the Electric Service Company, of Minneapolis, after June of 1944?

A. Yes, I did. But, as I recall it, those name plates applied there were with the Vancouver office, and some time in the fall of 1943 we produced some merchandise for him.

Q. For whom?

A. For the Vancouver office, Mr. Hughes; and we attached thereto name plates that were similar in design to the exhibit you have here.

Mr. Boldt: Now, what period was that, Mr. Soper?

The Witness: That was in the fall of 1943; in the fall of 1943 we attached some of those name plates to merchandise manufactured for the Vancouver office of the International Electric Fence Company.

Q. (By Mr. Snow): In the fall of 1943, who, to

(Deposition of Vernard Soper.)

the best of your knowledge and belief, were the owners of the Vancouver office?

A. Well, maybe I got my dates mixed; now, just a minute here: I made a mistake there in my dates; it should have been 1944. Because it was after I—just a moment; will you go back to that question once more?

Q. You previously, in answer to the last question fully answered, stated that in the fall of 1943 you had [369] shipped electric fence equipment with the name International thereon to Hughes, at the Vancouver office; now, my question was, who were the owners of the Vancouver office in the fall of 1943?

A. I think that my thinking in answering the question previously was a little bit in error; I was thinking of the time after 1944. It is true that we did ship considerable merchandise to the Vancouver office in 1943, and we used the same name plate that was used at Chicago. We also shipped considerable merchandise to E. A. Wyatt at Parma, Idaho, and to Mr. Klint out at Fresno. Now, that billing from Electric Service Systems was done from the International Electric Fence Company of Chicago.

Q. Now, let us go back to where we got off the track here, and refer back to the question that I gave to you; and that is, after June 1, 1944,—

A. Yes.

Q. —did you, in your manufacture and sale of electric fencers and fencer equipment, ever apply

(Deposition of Vernard Soper.)

the name International or International Electric Fence Company to fence controllers?

A. Yes.

Q. Would you explain that, please?

A. Yes; I put name plates bearing the name International on electric fence controllers sold to Mr. Hughes of the [370] Vancouver office of the International Electric Fence Company?

Q. Subsequent to June 1, 1944? A. Yes.

Mr. Snow: Will the Reporter please mark this as Plaintiff's Exhibit 5 for identification, which consists of a metal name plate and a decalcomania?

(Plaintiff's Exhibit 5 marked for identification by the Reporter and Notary.)

Q. (By Mr. Snow): I hand you Plaintiff's Exhibit 5 for Identification, and ask you if you can identify it.

The Witness: Yes; the Metal name plate in a diamond shape is one of the name plates that we attached to electric fence controllers for the International Electric Fence Company of Vancouver, Washington.

Q. Subsequent to June 1, 1944?

A. Yes; I believe it was in the fall or spring that we used this name plate, the spring of 1945, I believe. The decalcomania, or commonly called a decal, was attached to merchandise shipped to the Vancouver office; that is, it was attached to electric fence controllers.

Q. When?

(Deposition of Vernard Soper.)

A. In either late 1944 or 1945.

Q. Did you make the metal plate and the decal of Plaintiff's Exhibit 5, or were they furnished to you? [371]

A. No, we helped draw them up; I will say that. We helped to draw up the design.

Q. Of what?

A. Of these name plates and the decalcomania, and traded views back and forth with Mr. Hughes, and had them made to his specifications, and suggestions.

Q. Did he pay for them, or did you pay for them? A. We paid for them.

Q. When you say "we," whom do you mean; you said "we" designed with Mr. Hughes.

A. In the term "we," I meant Mr. Hughes and I designed it, more or less, through the mails. He came across with the basic idea, and I helped line it up so that it would be more fitting to the product it was going to be attached to.

Q. When you say the basic idea, what do you mean by that expression?

A. Well, the basic idea is this: that he made a rough draft of what he wanted in the way of a name plate.

Q. You are referring now to the metal name plate attached to Plaintiff's Exhibit 5?

A. To any and all name plates that were put on his merchandise; he made the rough draft and sent it to us; and then we worked it over and sent

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it back for his approval. And then after it was sketched up and approved by Mr. [372] Hughes, we would take it to the name plate manufacturer; he would make a detailed sketch and draw what we call a proof of the name plate, and then that was forwarded to Mr. Hughes for his final okay. And if it was proved to be as he wanted it, we went ahead and had them made.

Q. I don't quite get the reason for your use of "basic idea," and I don't think you have explained it.

A. Well, maybe we should term it this way: The design of the name plate was first originated with Mr. Hughes.

Q. Had you been shipping, prior to that time, electric fencers and such equipment bearing the name International in the form of a name plate shown in Plaintiff's Exhibit 2, to Mr. Hughes?

A. Prior to what time, sir?

Q. Prior to June 1, 1944? A. Yes, we had.

Mr. Snow: Off the record, please.

(Discussion, not for the record.)

Q. (By Mr. Snow): Mr. Soper, in the beginning of this deposition you stated that you had an exclusive sales arrangement with Mr. Turk, is that correct; that is, prior to the formation of a partnership agreement June 1, 1943?

A. Yes; we had that sort of agreement, that he would sell in the West and I would stick to manufacturing.

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Q. Exclusively? [373]

A. Well, I presume you would term it that way.

Mr. Boldt: An oral thing, was it?

A. Well, it was oral and more or less written, too. I believe Mr. Turk came back here one time and we sat down on a pile of lumber and talked it over. That was when we first more or less set up that thought. We never had any contract, or anything like that. I presume it was in our correspondence; what the sale was definitely, would be stating something I am not so sure of. But we did adhere more or less to that, and any inquiries that I received from the territory west of Colorado or Idaho I would forward to Mr. Turk to take care of.

Q. (By Mr. Snow): Then, according to your testimony, there never was a formal, written document relative to this exclusive sales arrangement?

A. No.

Q. Did you at any time make an exclusive sale agreement with Hughes or the International Electric Fence Company of Vancouver, or was that a deal made between Turk and Hughes?

A. That was a deal between Mr. Turk and Mr. Hughes. Refresh my memory on the date, please—well, that wouldn't make any difference, anyway.

Mr. Turk: Late in 1941.

The Witness: That is all right; I never entered into [374] any exclusive deal with Mr. Hughes at any time, or any type of sales deal.

Q. (By Mr. Snow): Now, in your testimony

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you stated that after June 1, 1944, you sold electric fencers to Mr. Hughes, of International Electric Fence Company of Vancouver, Washington, with a name plate similar to or identical with Plaintiff's Exhibit 5; can you tell us approximately the number of electric fencers bearing the name International that you sold to Mr. Hughes or the International Electric Fence Company during the period, say June of 1944 to April 22, 1947?

A. We sold a little over 3,000 fencers bearing the name of International attached thereto; I think it was 3200, or something like that.

Q. Might there be in that group of a little over 3,000 fencers, any equipment that might bear the name National?

A. Yes, there were some fencers sold with the name National attached thereto; I believe that was somewhere in the neighborhood of 300.

Q. Can you tell us the approximate invoice price of those approximately 3200 fencers that you just testifies to?

A. Yes; it was in the neighborhood of \$26,000 or \$27,000 of the two combined fence controllers.

Mr. Boldt: Is that the price that you billed Hughes [375] for them, you mean?

The Witness: Yes, sir.

Q. (By Mr. Snow): Now, your testimony was in the period of approximately from June 1, 1944, to April 22, 1947; now have you any idea as to the number of fencers that you sold to Hughes, of the

(Deposition of Vernard Soper.)

International Fence Company, from that period, April 22, 1947, to date, bearing the trade-mark International?

A. That is April, isn't it, you say?

Q. Yes, April 22, 1947, to date, bearing the name International.

A. That is April 22, 1944?

Q. No, 1947.

Mr. Boldt: From the last date ahead there.

The Witness: That is over a year; I just want to get this in mind a little bit. Oh, I suppose I have sold 300 or 350 fencers, or something like that.

Q. (By Mr. Snow): And the invoice price of that would be approximately what?

A. Let's see: I suppose——

Q. The aggregate total.

A. Yes; I will do a little thinking here: Oh, I suppose around 3,000 or 4,000 dollars, maybe 5,000 dollars worth; I think \$5,000 dollars would be the supreme amount. It is a little hard to judge, since I am not quite so [376] closely associated with actual orders received in my factory as I used to be, due to my turning over to the purchasing agent the processing of orders coming in and going out.

Q. Would you tell us, please, if you can, what the approximate number of the fencers is that you have sold to Mr. Hughes, or the International Electric Fence Company, Vancouver, Washington, during the period April 22, 1947, to date, bearing the trade-mark National?

(Deposition of Vernard Soper.)

A. Wait a minute; maybe I made a mistake here: what was that date again?

Q. April 22, 1947.

A. I think I made a mistake a minute ago, in that I didn't put any name plate on the fencers sold after June 1, 1947. So the question I answered a moment ago would have to be retracted by me as an error, because I was thinking of the total number of fencers produced, rather than those that I put the name International or National on.

Q. Will you please correct your answer, then, Mr. Soper?

A. I don't believe that would be over 100 fencers sold, at the very maximum, from April 22nd to the present date, bearing the name National or International attached thereto.

Q. And that figure would aggregate what, approximately, [377] as an invoice price?

A. Oh, we will say \$800 or \$1,000.

Q. Have you ever shipped any of this type of equipment to Mr. Hughes, or International Electric Fence Company of Vancouver, Washington, that did not bear any trade-mark International or National?

A. Yes, sir; we ship considerable merchandise to him without the names International or National, or any name attached thereto, except some of our own merchandise, which had our own name attached thereto.

(Deposition of Vernard Soper.)

Q. Has that been a policy of your company, from any period of time?

A. That has been the policy since June of 1947, when Mr. Turk and myself entered into an agreement whereby I would not use or attach the name International to any product going to Mr. Hughes.

Q. Did you use the name International on any product that you shipped out after June 1, 1947?

A. No, I have not.

Q. Have you sold any stock prods to the International Electric Fence Company of Vancouver, or Mr. Hughes, bearing the trade-mark International?

A. Yes, we sold considerable prods to him. What date did you have in mind there?

Q. June 1, 1944, to, let's make it April 7, 1947.

A. Yes, we shipped approximately 1100 stock prods; and I would say that ninety per cent of those went out under the name of International; the other ten per cent went out under the name of National.

Q. What was the approximate invoice price of those 1100 stock prods?

A. The invoice price was about \$2700.

Q. Was that your invoice price to Mr. Hughes, of the International Electric Fence Company of Vancouver, Washington?

A. Yes, sir.

Q. Did you ever ship any stock prods after April 7, 1947, to Mr. Hughes, or the International Electric Fence Company, bearing either the name International or National?

(Deposition of Vernard Soper.)

A. I don't believe so; although we could have shipped some. Normally, that is kind of a quiet season. We may have shipped a few; if we did, it would not have been over 24, or 50.

Q. We are talking, Mr. Soper, about the period from April 7, 1947, to date; and you mentioned the word "season."

A. I meant the season between April and June of 1947. You mentioned the word National or International attached thereto; we shipped considerable out there without a name attached—oh, a few hundred; I wouldn't say it would be [379] considerable, but I would say a few hundred.

Q. By referring to a few hundred, you are referring to the period April 7, 1947, to June 1, 1947?

A. No, after that date, and without any name.

Q. Can we be just a little more explicit: How many did you ship from April 7, 1947, to June 1, 1947?

A. Oh, I would say possibly fifty, or thereabouts; possibly none.

Q. What did you do after June 1, 1947, with reference to the International Electric Fence Company and Mr. Hughes, in the shipping of stock prods?

A. We shipped them without any name attached thereto.

Q. Did Mr. Hughes, after June 1, 1944, ever agree with you to absolve you from any liability or blame in case of trade mark infringement of use of the name International or National?

(Deposition of Vernard Soper.)

A. None, that I remember; there might have been, but I don't remember of any such statement. It was just, I think there was some correspondence in the mail about the fact that he had that company out there, and had a right to use it as he saw fit. But whether there was any particular agreement, I don't recall any right now.

Q. Did he ever represent to you that he had any rights to the name International or National, from June 1, 1944, to date? [380]

A. Well, yes, I believe so, in our correspondence and conversations, that he did claim he had rights to the name.

Q. As a manufacturer of this equipment and the placing thereon the trade mark International, were you ever charged with infringement of use of the trade mark International? A. Yes, I was.

Q. By whom?

A. By Mr. Turk, of the International Electric Fence Company of Chicago, Illinois.

Q. Did you hire a lawyer to represent you in that matter? A. Yes.

Q. Did you pay the bill or did Mr. Hughes pay the bill for the lawyer? A. I paid the lawyer.

Q. Were you ever recompensed by Mr. Hughes? A. No.

Q. Now, referring back to the partnership agreement, you entered into a partnership on June 1, 1943, with Mr. Turk; you stated that Mr. Turk turned over to you as an asset of his, in order to

(Deposition of Vernard Soper.)

form this partnership, about 100 shares of stock in the Vancouver corporation, at which time you stated that corporation was composed of substantially Mr. Turk and Mr. Hughes; is that correct?

A. Yes, sir.

Q. Now, as a stockholder of that corporation, after [381] June, 1943, do you have any knowledge in your own mind as to what the main asset of that corporation was?

A. Yes; the main asset of that company was the sales outlets; I mean by that, the earning power of the company due to its efforts and sales. I knew what they paid for the merchandise, and I knew what they sold it for.

Q. Did you know of your own knowledge whether or not Mr. Turk turned over his exclusive sales franchise for the states of Washington and Oregon to the International Electric Fence Company of Vancouver, Washington, prior to June 1, 1943?

A. No, I was not aware of the dealings between Mr. Hughes and Mr. Turk at that time; that is, I didn't know just how they transacted their division of the profits.

Q. Well, that does not answer the question, Mr. Soper. Would you mind repeating the question again, and see if you can get it?

Mr. Boldt: Off the record.

(Discussion, not for the record.)

Mr. Snow: Read the question again.

(Deposition of Vernard Soper.)

(Pending question read by the Reporter and Notary.)

The Witness: Well, I wouldn't know; I still could not say just how they divided. I knew there was some system they had out there, of their own, that had to do with fencers; and I think there was accessories that they [382] bought from a concern here in Chicago. But prior to June, 1943, I was not in full knowledge of just how the business was transacted. That is about all I can say on that.

Q. (By Mr. Snow): All right; prior to June 1, 1943, you testified that you had entered into an oral agreement with Mr. Turk whereby Mr. Turk was given exclusive sales franchise of electric fencers and analogous equipment for the West Coast; that is equipment that you manufactured, is that correct? A. Yes, sir.

Q. Did you, at any time prior to June 1, 1943, ever give an exclusive sales franchise to any of the Western states to anybody else?

A. No; no, I had nothing to do with the sales out there in any respect, excepting as I mentioned once before, this Denver deal, which was a minor issue.

Q. Mr. Soper, of your own knowledge, do you know whether or not the word International as a trade mark on electric fencers and fencing equipment was an asset in the sale of this equipment on the West Coast?

A. Yes, it was, very much; because—possibly

(Deposition of Vernard Soper.)

it was not too much of an asset in 1938, but the latter part of 1939 it began to gain back its reputation; and from that time on, it was an asset.

Q. Would you mind explaining why you say it was an [383] asset?

A. Well, we had done a very successful job in producing an electric fence controller that met with the requirements of the farmers, and particularly the livestock raisers. And the word International became well known and established as a reputable house to do business with, and one that would put out an electric fence controller that met the requirements in that particular area.

Mr. Boldt: And then a recess was had until 1:30.

Direct Examination

By Mr. Snow:

Q. Mr. Soper, did the Washington corporation of International Electric Fence Company ever manufacture any merchandise of the same descriptive properties, or merchandise including electric fence controllers and equipment?

A. In 1938 and 1939, yes, there were controllers that were manufactured out there.

Q. By the International Electric Fence Company?

A. International Electric Fence Company; yes, sir.

Q. And that company was who?

A. R. H. Turk, at that time, and known as the International Electric Fence Company.

(Deposition of Vernard Soper.)

Q. To the best of your knowledge and belief, that was the only manufacturing done, was the manufacturing by International Electric Fence Company, or a corporation [384] by that name?

A. Yes.

Q. To the best of your knowledge and belief, did the Washington corporation ever at any time, other than in 1938 and 1939, assert any rights to manufacture these electric fence controllers?

A. None that I know of.

Q. Referring back to your testimony earlier this morning, in order to clarify your testimony, did you ever at any time make any sales contract, exclusive or otherwise, with anybody on the West Coast, excepting Mr. Turk?

A. No; no, I didn't make any other agreement with anyone.

Q. So that Mr. Turk is the only one who ever had an exclusive sales contract from you; is that correct?

Mr. Boldt: Well, I object to the form of that question.

Mr. Snow: Well, it is answered.

Q. I call your attention, Mr. Soper, to Plaintiff's Exhibit 2 for identification and Plaintiff's Exhibit 5 for identification, and particularly the metal plate of Plaintiff's Exhibit 5 for identification; and ask you whether or not there is any similarity between the two plates?

A. Yes, I would say there is quite a bit of similarity, the prime difference being in the addresses

(Deposition of Vernard Soper.)

and models of the fencers. Otherwise, they are quite similar; except for size, of course. There is one little difference under the word "approved," which may be insignificant.

Q. Does the No. 106, Model No. 106, mean anything to you?

A. Yes; it designates a definite type of electric fence controller.

Q. Who adopted that number, to your knowledge, if anybody?

A. Well, it has been a unit number of the International Electric Fence Company; and I believe both Mr. Turk and Mr. Hughes have used that number?

Q. Do you know who used it first?

A. Well, it was used originally from the office at Chicago, shipped to the Vancouver office and sold there, that particular model number; and it was continued that way by both companies.

Q. By Chicago office, do you mean the partnership between you and Mr. Turk, or when you were doing business here in Illinois?

A. Well, both; it has always been used here, and it has been an old model number that we have used since, oh, I presume, 1940, or thereabouts, I believe, when it first came into existence. [386]

Mr. Boldt: When you use the word "we" there, you are referring to both the Vancouver company and the Chicago company?

The Witness: Yes, sir.

(Deposition of Vernard Soper.)

Q. (By Mr. Snow): Referring to the words "Model No. 411," does that mean anything to you?

A. Yes, that was a fence that was designed in about 1939 or 1940, and it was a particular type of unit that we made; and it represents, you might say, electronic type of fence controller.

Q. Whom do you mean by "we"?

A. That was Mr. Turk and myself. I did some of the designing, and so forth, here, and sent it out to him, and he would make his suggestions, and so forth, as to improvements necessary, as to actual operating of the unit on his farm, and other farms.

Q. When you say "we," again, whom do you mean?

A. Mr. Turk and myself in this case, sir.

Q. And when was that, again?

A. That was in 1939 and 1940.

Q. Does the expression "Model No. 44D" mean anything to you?

A. Yes; that is a continuous current unit. The exact date of giving that model number out is not clear in my mind, however. [387]

Q. Do you have any idea as to the date?

A. Oh, I suppose somewhere around 1943, or thereabouts, I believe.

Q. Would it be before or after you entered into an agreement with Mr. Turk to form a partnership?

A. I can't rightfully say just when that model number came into existence.

(Deposition of Vernard Soper.)

Q. Did you ever make any fence controllers under that designation? A. Yes, sir.

Q. For whom?

A. Well, I know I have made them for the International Electric Fence Company at Vancouver.

Q. When?

A. Well, that would be after 1944; and it seems like I made some for the company here at Chicago, but I am not sure.

Q. You wouldn't know when, then?

A. No, I don't; I still don't know.

Q. Does the designation "Model No. AD 31" mean anything to you?

A. Yes; that particular unit was our original electric fence controller manufactured as a continuous current unit. It was our first unit, I should say, manufactured with the continuous current use; and that unit was manufactured [388] first in 1939, I believe. And I manufactured that here and shipped it to Mr. Turk at Vancouver, Washington, and it was sold under the name International Electric Fence Controller.

Q. Did you ever make any of these controllers which you have identified as No. 106411, 44D, and AD 31 for Mr. Hughes and International Electric Fence Company, since July 1, 1944?

A. Yes, sir.

Q. Did you label those controllers with those numbers? A. Yes, sir.

(Deposition of Vernard Soper.)

Q. Who was responsible for your labeling them as such?

A. Well, Mr. Hughes asked me to attach that name plate to them.

Q. By the expression "name plate," what do you mean by that?

A. Well, such as your Exhibits 2, 3, 4 and 5.

Q. Is there a name plate in front of you that Mr. Hughes asked you to attach to those devices, which would exemplify that type of marking?

A. Yes; Exhibit 5, bearing the Model No. 44D, is such a name plate.

Q. Mr. Soper, do you have any interest in this controversy? A. No, sir? [389]

Q. Is anybody paying you to testify here today?

A. No, sir.

Q. Are you testifying on your own free will and accord? A. Yes, sir.

Mr. Snow: I now offer into evidence Plaintiff's Exhibits 1 through 5, inclusive.

Mr. Boldt: And, of course, objections are reserved, like everything else, of course.

Mr. Snow: Your witness, Mr. Boldt.

The Court: I think we will take the afternoon intermission and then we will proceed. I want to say that my reason for wanting it in the record is that it gives a more complete stenographic record and it gives the Court an opportunity to hear it the second time.

(Deposition of Vernard Soper.)

(Whereupon, at 2:45 o'clock p.m., January 17, 1949, a recess was had until 3:00 o'clock p.m., January 17, 1949.)

(Counsel heretofore noted being present, the following proceedings were had.)

The Court: You may continue.

Cross-Examination

By Mr. Boldt:

Q. Mr. Soper, in order to get the over-all picture together in one place, I would like to kind of summarize, if we can, the major developments in the operation of [390] this business; will you follow me for that purpose? A. Yes.

Q. As I understand it, in 1938, you had this Oregon corporation? A. Yes, sir.

Q. That you and Mr. Turk were the owners of?

A. Yes, sir.

Q. And you operated under that corporation for a period of time, when you found it necessary for you to go to Chicago and Mr. Turk to go to Vancouver; that was in 1938, also, the latter part of the year?

A. I might make one correction there: I came to Chicago in the spring.

Q. And he went to Vancouver in the fall, or August? A. Yes.

Mr. Snow: What year, now?

The Witness: 1938.

Q. (By Mr. Boldt): Then, the next major de-

(Deposition of Vernard Soper.)

velopment was the incorporation of the Washington business, wasn't it? A. Yes, sir.

Q. Did you know of the Washington corporation being formed?

A. Well, I knew that Mr. Turk was trying to acquire some money; I didn't know just how he was going to set it up at that time. But I knew as soon as it took place, [391] yes.

Q. And that was in October, 1941?

A. Yes, I believe that was right.

Q. And that corporation, when it was organized under the laws of the state of Washington, had the same name as your old Oregon corporation had had; is that correct? A. Yes, I believe.

Q. Identically the same, yes?

A. Yes, I believe that's right.

Q. International Electric Fence Company, Inc.?

A. Yes, I believe that's right.

Q. And you knew that, of course, from the time it was organized? A. Yes.

Q. You yourself, however, didn't participate in the organizing of that Washington corporation?

A. No, sir.

Q. That was something that Mr. Turk and Mr. Hughes attended to? A. Yes, sir.

Q. And you yourself had no interest of any nature in that business, in the Washington corporation business? A. No, I didn't.

Q. In other words, you held and owned no stock in the Washington corporation at that time? [392]

A. No, sir.

(Deposition of Vernard Soper.)

Q. You didn't participate in the organization of the corporation in any manner? A. No, sir.

Q. You were not an incorporator, nor in any other manner did you participate in the organization of that corporation? A. No, sir.

Q. Excepting that you did know it was being organized, and you knew of its activities under the very identical name that you had previously had for the Oregon corporation? A. Yes, sir.

Q. In the meantime the Oregon corporation had discontinued business, had it?

A. Yes, I think it had just been dropped.

Q. It had just expired? A. Just expired.

Q. And that was some time prior to the organization of the Washington corporation?

A. Yes; I would say about a year and a half or two years, something like that.

Q. Would you say that the Oregon corporation expired, in the sense of being actively engaged in business, about the time that you and Turk split up and you came back to Chicago and he went to Vancouver?

A. Yes; only, I was here in Chicago all the time.

Q. A little bit before he got to Vancouver?

A. Yes.

Q. But, I mean it was about that year, 1938?

A. Oh, yes, sir.

Q. That the Oregon corporation ceased functioning as an active concern; is that right?

A. Yes, as an incorporated concern.

(Deposition of Vernard Soper.)

Q. That is what I mean. A. Yes.

Q. Did you actually go through legal forms of a dissolution of that Oregon corporation?

A. Not to my knowledge, no.

Q. You just simply didn't do anything more about it, is that it?

A. It just died on the vine, I guess.

Q. And you and Turk both considered it as a dead entity, the Oregon corporation?

A. Yes; yes.

Q. Now, after the organization of the Washington corporation in October, 1941, Mr. Turk continued out in the Vancouver area for some time after that, did he not?

A. Just a moment on that, now——

Q. What I mean is, he continued living and working and being active in the Vancouver area?

A. Yes; oh, yes. [394]

Q. That is what I am getting at. A. Yes.

Q. In other words, he didn't actually come to Chicago, Mr. Turk? A. No.

Q. Until June of 1943?

A. Yes; that's right.

Q. So, between 1941, when the Washington corporation was organized, and June of 1943, when Turk came to Chicago, Turk and Hughes together were conducting and operating the Washington corporation business? A. Yes, sir.

Q. Is that right? A. Yes, sir.

(Deposition of Vernard Soper.)

Q. Then, after June of 1943—well, I guess in June of 1943, you and Turk entered into this partnership agreement which is evidenced by this paper marked here Plaintiff's Exhibit 1 for identification?

A. Yes, sir.

Q. Now, at that time, as I understood it, you made a certain arrangement with Turk whereby he was supposed to give you a certain interest in the Washington corporation?

A. Yes, sir.

Q. Supposed to give you certain stock? [395]

A. Yes, sir.

Q. Did you ever receive that stock?

A. Well, not actually; no.

Q. That is what I mean; did you ever have in your hands the stock certificates?

A. No, sir.

Q. Were they ever transferred to your name on the books?

A. No, sir.

Q. Were you ever officially recorded on the books of the Washington corporation as a stockholder of that corporation?

A. I don't believe so; I don't know about that, for sure.

Q. Did you ever vote any of your stock in the affairs of the Washington corporation?

A. No, sir.

Q. Did you ever, in any manner whatsoever, exercise any rights or prerogatives or privileges as a stockholder of the Washington corporation?

A. No, not only just our suggestions between Dick and myself.

(Deposition of Vernard Soper.)

Q. That is, between you and Turk?

A. Yes.

Q. But, I mean so far as the affairs of the Washington [396] corporation were concerned, did you ever exercise any functions in connection with it at all? A. No, sir.

Q. This partnership that you formed with Turk was terminated almost exactly a year later; in other words, June 1, 1944, is that right?

A. Yes, sir.

Q. So that that continued only for about a period of a year? A. Yes, sir.

Q. And then after you terminated your partnership arrangement with Turk, you went to Minneapolis, or continued operating the Minneapolis business? A. Yes, sir.

Q. The Electric Service, and he stayed here in Chicago, with the office that was here; is that right?

A. Yes, sir.

Q. And that continued, then, until July 1, or about July 1 of 1944, when Mr. Turk sold all of his interest in the Washington corporation; is that correct?

A. Yes, that is my information; yes, sir.

Q. From whom did you learn that fact, that Turk had sold all of his interest in the Washington corporation?

A. Well, I learned that fact from both Mr. Hughes and Mr. Turk. [397]

Q. Both of them so informed you about that time?

(Deposition of Vernard Soper.)

A. Yes. I might say, I think that Dick spoke to me about the fact that he was going to sell, or was making overtures, or Mr. Hughes was making overtures; at least, they were working together, and then he went up there and made the deal.

Q. When you say Dick, you are speaking of Mr. Turk? A. Yes, sir.

Q. And you say Mr. Turk told you at the time, or about the time that he made a sale to Mr. Hughes, that he was proposing to sell his interest in the activities of the Washington corporation?

A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And did Mr. Turk undertake at that time, or any later time, to indicate to you that there was any reservation of any kind as to what he was selling to Mr. Hughes?

A. No, at that time he didn't say anything about it; he just said he was selling out, and I didn't go into it much; because it was of no particular interest to me.

Q. Well, now, Mr. Turk knew at that time that you were still manufacturing fencers, didn't he; or did he?

A. Let's see; that is in 1944, isn't it?

Q. Yes. [398]

A. Yes, I was still manufacturing fencers.

Q. And presumably would sell fencers to Mr. Hughes, or anybody else who wanted to buy fencers?

A. Well, I was not manufacturing them at that

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time primarily for Mr. Turk; but they were shipped—wait a minute; yes, 1944, we are talking about.

Q. That's right; 1944, from the time that you terminated your partnership with Turk he had no strings on your operations in Minneapolis, nor you any on his here; is that right?

A. No, there wasn't any particular—we worked together and I shipped to him as he ordered, or to whatever accounts he asked me to ship.

Q. But there was no reservation in the agreement between you and Mr. Turk when you terminated your partnership and you took over the Minneapolis business, that you would be prevented from manufacturing any product that you wanted to, and selling it to anybody you wanted to, was there?

A. Well, no; there was no official, or otherwise, agreement, no more than a written termination of our contract.

Q. That is what I mean, Mr. Soper; what I mean to say, in simple language, is that when you and Turk terminated [399] your partnership relationship you went on and took this Minneapolis business and were free to conduct that business in any manner you saw fit, were you not, as far as Turk was concerned? A. Oh, yes, sir.

Q. And he was free to conduct his business here in Chicago as he saw fit? A. Yes, sir.

Q. And neither of you had any interest or any

(Deposition of Vernard Soper.)

reservation of interest in the business of the other from that time forward?

A. Would you repeat that?

Mr. Boldt: Read the question, please.

(Pending question read by the Reporter and Notary.)

The Witness: No, I don't believe we did.

Q. (By Mr. Boldt): In other words, you were free and independent people? A. Yes.

Q. You did business together, you sold him merchandise and he bought it, and so on?

A. Yes.

Q. But you were free and independent, having no connection one with the other, so far as ownership was concerned? A. Yes, sir.

Q. Is that right? [400] A. Yes, sir.

Q. So that, as far as Turk was concerned, you were free to manufacture and sell fencers to anybody that you saw fit, were you not?

A. Yes, sir.

Q. Has Turk ever asserted any claim to the contrary of that, as far as you know, to the present time?

A. No; not unless you would call this present issue, about a year ago, or such a matter.

Q. When he objected to your affixing the name tag on the merchandise that you manufactured for Hughes? A. Yes, sir.

Q. But, other than that, has he ever asserted any reservation of any right or power of direction

(Deposition of Vernard Soper.)

over your business, or for whom you manufacture, or to whom you sell? A. No, sir.

Q. Now, after the time that Mr. Hughes bought out the whole of the Washington corporation; namely, after July 1, 1944, from that time your dealings with Mr. Hughes and the Washington corporation has been entirely independent of Mr. Turk?

A. Yes, I believe they have; I don't think there is any contact there at all.

Q. Now, when, for the first time, did you ever hear from [401] Mr. Turk any assertion of any objection on his part to your furnishing or supplying Hughes with fencers, or using the name International, or any other complaints of any kind by him with reference to the Washington business; when was the first time?

A. Well, I believe it was around the first of the year, 1944.

Q. 1944?

A. Or 1945; I stand corrected. 1945, I believe it was.

Q. Now, is that the time when the matter of the use of the name arose first?

A. I believe it was; I think it was in the spring but I am not real sure of 1945.

Q. What did Mr. Turk do, write you, or talk to you, or what; how did he contact you?

A. I don't remember whether writing or whether we talked; I think it was writing, but I am not real

(Deposition of Vernard Soper.)

sure on that. If I remember correctly, he advised me that Mr. Hughes didn't have any right to the name International and that I shouldn't put the name plate International on this product for Mr. Hughes.

Q. And you say, when was that that you first received that notification?

A. Well, I think it was early spring or winter of 1945.

Q. Do you happen to have any such correspondence with [402] you? A. No, I do not.

Q. Would you be able to find any such correspondence in your files, and mail me copies of them, or the originals, if you have any such?

A. Well, I think I have some; I will try and find them.

Q. When you return home? A. Yes.

Q. I would appreciate it if you did.

A. Yes.

Q. Now, Mr. Soper, I was trying to get that summarized up to now; now, I want to go back on just a question or two about each one of these steps: At the time that you came to Chicago, in April of 1938, from that time on you and Turk terminated any interest, each of you, in the business of the other, any ownership interest?

A. Yes; that took effect in, oh, July or August, or thereabouts; we decided it would be mutually beneficial to both of us to work independently, as long as we didn't have enough to work together.

(Deposition of Vernard Soper.)

A. Yes; was that, you say, from June or July, 1938? A. I say about July.

Q. Well, the summertime of 1938?

A. Yes.

Q. You and Turk agreed to go your separate ways, as far [403] as either of you having any ownership in the business of the other; is that correct?

A. Yes, sir.

Q. And from that time until the time that you formed this partnership in 1943,—or, in other words, for a period of about five years, Turk didn't have any interest in your business that you were conducting back here,—any ownership interest?

A. No.

Q. And you didn't have or assert any interest in the business that he was conducting out in Vancouver; is that right? A. That's right.

Q. Now, what name were you doing business under, here in Chicago, during that five-year period?

A. I was using the name International Electric Fence Company.

Q. The same identical name that the Oregon company had had, and the same name that the Washington company was using; is that right?

A. That is correct, except it was Inc., I believe, in the Oregon corporation, and it was company in the Vancouver until October of 1941, at which time it became Inc. also.

Q. But you didn't use the Inc. back here? [404]

A. No, sir.

(Deposition of Vernard Soper.)

Q. But during that five-year period when Turk had no interest in your business at all, any ownership interest in your business, you were using the name International Electric Fence Company in your operations here in Chicago, were you?

A. Yes, sir.

Q. And you were utilizing the name International on the product that you were manufacturing during that period, were you not?

A. Yes, sir.

Q. And you were selling that product at given prices per unit to Turk,—first to Turk and later to Turk and his new Washington company; is that right?

A. Yes, sir.

Q. During that period, then, you were using the name International for the products manufactured by you and sold to Turk at given, fixed prices per unit?

A. Yes.

Q. And Turk was using the name International in his operations until the time that he incorporated; and then after the Washington corporation was formed, the Washington corporation used the name International, all three then using the name International on the products that were being in one case manufactured and on the other hand [405] distributed by the three of you; is that correct?

A. Yes, sir.

Q. And, in point of fact, during that period of time the name plates that you were using had the names of all three of the cities where all three of you were operating, did they not?

(Deposition of Vernard Soper.)

A. Yes; except our New York office didn't function very long.

Q. I realize there was a short time that New York was in no way—— A. Yes.

Q. But Vancouver, Washington, was included on these name tags that you were manufacturing or putting on your manufactured product at a time when you had no connection with the Vancouver corporation at all? A. No.

Q. Is that right?

A. No; we put them on for the purpose of advertising and prestige, I presume.

Q. And that name, the name Vancouver was carried on the name plates and on the literature advertising this material, both prior and after the time that the Washington corporation was organized, and both prior and after the time that Hughes bought all of the stock in the Washington corporation, was it not? [406] A. Yes, sir.

Q. Now, Mr. Soper, during the period that you and Turk were partners here in Chicago, that one-year period from June of 1943 to June of 1944, you were manufacturing fencers during that period also, weren't you? A. Yes, sir.

Q. And were you during that period using tags, name plates similar to those shown in the exhibits 2, 3, 4 and 5, which included the name Vancouver, Washington, on the tag? A. Yes, sir.

Q. From July of 1938, the time when you and Turk separated your businesses, to June of 1943, when you formed this partnership; namely, that

(Deposition of Vernard Soper.)

five-year period, were you during that period making and selling fencers to persons other than Turk?

A. Oh, yes, sir.

Q. And where were you selling them?

A. Well, I was selling them over quite a bit of the Middle West; I sold a few in Texas, and a few in immediate States here surrounding Chicago, Illinois, and some in the east.

Q. And were you using on those fencers the name International? A. Yes, sir. [407]

Q. And employing it in the products that you were making? A. Yes, sir.

Q. You were? A. Yes, sir.

Q. Now, did you ever see the stock certificates in the Washington corporation that were supposed, that you were supposed to get from Turk in your partnership agreement of June, 1943?

A. No, sir; I did not.

Q. You never saw them? A. No, sir.

Q. Do you know, Mr. Soper, that they were never issued?

A. They were never issued to me, no.

Q. That is what I say, to you? A. No, sir.

Q. As far as you know, there was never any stock certificate even issued to you for your stock, that you were supposed to get from Turk in that deal? A. No, sir.

Q. Now, after July 1 of 1944, the time when Turk sold out his interest in the Washington corporation to Mr. Hughes, you eliminated the names New York and Chicago from these tags, did you

(Deposition of Vernard Soper.)

not, and carried only after that time Vancouver, Washington; is that right? [408]

A. Yes, I believe that is right; it was right in there some time; yes, it would be after that time.

Q. That is what I say. A. Yes.

Q. In other words, up until the time that Turk sold his interest in the Washington corporation to Hughes, all of the literature had carried the names Chicago, New York and Vancouver, Washington.

A. Yes, sir.

Q. After the time that Turk sold out his interest in the Washington corporation to Mr. Hughes, then the tags bore only the name Vancouver, Washington; is that correct?

A. Yes, sir.

Q. Now, Mr. Soper—to some extent, I think this was covered on direct, but I want to make it plain: Now, the use of the name International has been referred to by Mr. Snow here as an asset; and, of course, you meant, when you spoke of it as an asset, as an asset of the Vancouver business, did you not?

A. Well, I presume that is what he meant.

Q. Well, that is what I thought you meant, but I wanted to be sure. When you were speaking of the name International as being an asset, you were speaking of it as being an asset of the Washington corporation, conducted in the Vancouver area, were you not? [409]

A. Well, if I am correct, that was meant as an asset to the value of the company out there.

(Deposition of Vernard Soper.)

Q. Let's put it this way: Regardless of what you meant then, is it not true, Mr. Soper, from your experience in this business, that the name International as applied to the products being handled by the Washington corporation, was a valuable asset of that Washington corporation's business?

A. Yes, that would be important; because the name was well known in the territory.

Q. That's right; in other words, when Mr. Snow asked you what did you consider one of the prime or primary assets of the Washington corporation, you said the right to sell and the salespower of that organization. Now, when you were speaking of the right to sell, and sales power, you are talking about selling products labeled International, aren't you?

A. Yes, sir.

Q. That was the thing that had value in that concern, wasn't it?

A. Yes, sir.

Q. The sale of a product labeled International?

A. Yes, that had been built up there over a few years; and it was recognized in the field as authority in the field of electric fence controllers. [410]

Q. Yes; so that the word International in the month of June, 1944, had a substantial value to the Washington corporation's business, didn't it?

A. Oh, yes; very much so.

Q. And anyone purchasing that business, or interested in the purchasing of that business would be extremely interested in having the right to con-

(Deposition of Vernard Soper.)

time using the name under which that product was selling?

A. Well, I imagine so; yes.

Q. Can you imagine anyone buying that business and not wanting the use of the name of the product for which they had spent their time and effort building it up?

A. Well, they would have to have that name all right, I imagine, to get the benefits from the company.

Q. They couldn't possibly realize the values of that company without having the right to the use of that name, could they, Mr. Soper?

A. Well, no, sir; I don't believe so.

Q. Then, in June of 1944, a very important asset of the Washington corporation was the right to the continued use of the name International on the products that the corporation was handling, was it not?

The Witness: Would you repeat that, please?

Mr. Boldt: Read the question, please.

(Pending question read by Reporter and Notary.) [411]

A. Well, it was an important factor in the business out there, yes; that name was important.

Q. And it was an important asset to the business, wasn't it?

A. Well, yes, it would be; because the sales policy had been to establish International as a good product. That had been our endeavor, well, since 1938.

(Deposition of Vernard Soper.)

Q. As a matter of fact, that was the very essence of the business conducted by the Vancouver office, wasn't it, the selling of products labeled International? A. Yes, sir.

Q. And, of course, the name that the corporation used was International Electric Fence Company, Inc., wasn't it? A. Yes, sir.

Q. So that the name used on the products was the same name, the prominent name used in the corporation itself? A. Yes, sir.

Q. Did Mr. Turk at any time inform you of the fact that he was organizing this Washington corporation?

A. Well, he had written and said that he was trying to get some money into the business in 1941, and that he thought it was necessary for all of us concerned; or that is, Mr. Turk and myself, to have more money in the business, which we did lack. And he was trying to secure financial assistance from somewhere, which he evidently [412] did from Mr. Hughes; and they formed a corporation then and continued, or he continued as it is known.

Q. Now, Mr. Soper, at the time that you and Turk separated your businesses, was there any written agreement of any kind between you concerning the continued use of the name International as between the two of you?

A. Well, no, there wasn't any written agreement to that effect.

Q. Or any oral agreement between you, or un-

(Deposition of Vernard Soper.)

derstanding that you were free to continue using the name International, and he likewise?

A. No, there was nothing said about that.

Q. You just went ahead and did it, is that it?

A. It was just one of those things; I just sold my business down here to him; that is, my interest in this Chicago business to Mr. Turk.

Q. You are getting ahead of me. I meant from the time that you separated, in 1938.

A. Oh, I beg your pardon.

Q. Yes; from that time on, to the time that you became partners here in Chicago, 1943, that five-year period, you both went ahead and widely used the name International in your respective businesses?

A. Yes, we did, to further that name to the extent possible. [413]

Q. And that was an agreement, that you were both free to do that, were you?

A. Yes, sir.

Q. You took no exception to his use of the name International during that period, and he took no exception to your use of it?

A. No, sir.

Q. But, in point of fact, it was the thing that you both desired to do, in order to exploit and develop the use of products bearing that name; is that right?

A. That's right; yes, sir.

Q. Now, when he undertook to organize a corporation out in Washington with that very same name, you took no exception to that?

(Deposition of Vernard Soper.)

A. No, sir.

Q. Because, as between you and him, he was free to do that if he chose; isn't that right?

A. Yes, sir.

Q. Now, you have spoken here, counsel has spoken here of an exclusive, I think in some cases he refers to franchises and in others to contracts; has there ever been any writing of any kind between you and Turk with respect to any exclusive franchise or contract between the two of you at all?

A. None that I remember. Our correspondence in general, [414] and our conversation, led us to believe that it was best that he sell in the West and I would sell in the East, or the Middle East, and so forth, wherever the freight rates would make a break to the advantage of whichever point we were shipping to.

Q. Was there ever any written document of any kind evidencing any franchise for any period of years, or anything of that kind?

A. No, I don't believe there was.

Q. So that, as far as you know, the understanding between you and Turk was that that arrangement was indefinite in extent; is that right?

A. Yes, it was just an agreement, an understanding that we had, I presume you would say.

Q. But either one of you could terminate any time you saw fit, is that correct.?

A. Well, we could have, yes. That never entered my mind, but it could have been that way, I presume.

(Deposition of Vernard Soper.)

Q. I want to find out what this understanding was; it was your understanding that you were free, any time you saw fit, to terminate your relationship with Turk, this so-called division of operations between you?

A. Yes; I presume either one of us could quit, if we had been dissatisfied with the services of the other. [415]

Q. That was your understanding of it, in any case? A. Yes, I would say that was it.

Q. Now, Mr. Soper, Mr. Turk didn't procure from you, at the time that the Washington corporation was organized, any contract or written agreement of any kind guaranteeing to the Washington corporation any particular rights of any kind in the distribution or sale of fencers?

A. What period did you have in mind?

Q. I say, at the time that the Washington corporation was organized?

A. No, there was nothing made up; and there was a corporation formed between Mr. Hughes and Mr. Turk.

Q. And you didn't undertake to have anything to do with that at all? A. No; no, I didn't.

Q. Did you ever grant to the Washington corporation, did you individually ever grant to the Washington corporation any rights of any kind at all? A. No; we didn't grant anything.

Q. Not "we" now; I mean you.

A. I mean, no, I didn't grant anything; we

(Deposition of Vernard Soper.)

just did business that way. I meant, it was just one of those things that grew, I guess.

Q. Like Topsy? [416] A. Like Topsy.

Q. That is what I am getting at; as far as you are concerned, you never, in writing or orally, extended any rights or granted any franchises, or anything else, of any kind, to the Washington corporation, did you?

A. I never gave any franchise; but we did write and orally talk over his handling the West.

Q. That's right; but I say, you never granted any right that was not revocable at your will or at the will of the Washington corporation?

A. Oh, no; no, there was nothing like that. I mean, they could have quit me; and I presume, I could have quit them, without any repercussions, except our own feelings.

Q. Have you ever examined the books or records of the Washington corporation, concerning any of the transactions that we have referred to, Mr. Soper?

A. No, I never have; I had a sheet or two giving me financial data here a few years ago, when I had some interest in the company; but I never—it was nothing more than just a balance sheet.

Q. Have you ever at any time examined any of the books or records of the Washington corporation, pertaining to the organization of the corporation, and the transfer from Turk to Hughes

(Deposition of Vernard Soper.)

of the stock sold by Turk to Hughes in July of 1944? [417] A. No, I have not.

Q. You have never seen any of those?

A. I have never seen any of those books or any of those records.

Mr. Boldt: I think that is all that I have.

Redirect Examination

By Mr. Snow:

Q. Mr. Soper, you testified on cross-examination that during the years 1943 and 1944 you used tags similar to Plaintiff's Exhibit 2, containing the words Chicago, New York and Vancouver; why did you use those tags?

A. Well, we used them for the purpose of designating offices that we had where sales could be made from, or jobbers could contact us. And the purpose of putting those names on there was primarily prestige; that is, putting the name International on there was primarily prestige. It was our hopes to secure a distributor for that area.

Q. Were those tags ordered originally in great quantities? A. Yes, they were.

Q. When were the tags originally ordered, Mr. Soper?

A. Oh, I believe this particular diamond shape was [418] ordered some time in 1943, I think; I don't remember when we went to this particular design, whether it was 1942 or 1943, or 1944.

Q. I am speaking now of tags carrying the three offices on the face of them.

(Deposition of Vernard Soper.)

A. Oh, I beg your pardon. Well, we started that, the tags carrying the three offices, we started that in 1939, I believe it was.

Q. And you carried on using the three offices until when?

A. Until, well, maybe they are still doing it; possibly Mr. Turk is still doing it.

Q. I am talking about your own knowledge.

A. Oh, I beg your pardon. Well, that would be until about July, or June, 1944.

Q. Was there any surplus of those metal tags on hand in Minneapolis June 1, 1944?

A. Yes, there was.

Q. What happened to those tags?

A. I sent a quantity of those back to Mr. Turk, here in Chicago.

Q. When you say a quantity, what do you mean?

A. Oh, quite a few of them; I don't remember just how many there were.

Q. Did you retain any in your possession? [419]

A. There may have been some; I think there were some found quite a little later, when we moved, a couple of years, that had not been sent back. They just had not been found.

Q. What was your intention relative to those tags, in June of 1944, when you said you sent a quantity back; were you going to send them all back?

A. Yes, it was intended they all go back. They got packed up, they just didn't get sent back, that

(Deposition of Vernard Soper.)

is all. They had the name Chicago and New York on them, and I presume you would call them right-fully Mr. Turk's property.

Q. And that is the reason why you sent them all back to Mr. Turk? A. Yes.

Q. Now, during the period prior to June 1, 1943, you stated on direct examination that you used the same label as exemplified by Plaintiff's Exhibit 2 on fence equipment, electric fencers that you sold throughout the Middle East area, and the Eastern area; and you also testified that those were the same tags that were on the equipment you sent to the Vancouver office for their sale?

A. Yes.

Q. Now, why did you use the same labels? [420]

A. Well, I used the label shown here in Exhibit 3 for the purpose of designating our controllers from 1939 up to 1943; and that was used to designate our main offices; and it had the three names, Chicago, New York and Vancouver attached thereto.

Q. You again used the word "our"?

A. Well, I should say from 1939 to 1943, I speak of our—it should be Mr. Turk and myself, or International Electric Fence Company at Vancouver and the International Electric Fence Company at Chicago.

Q. Did you consider the name International as a valuable asset of the partnership of Soper and Turk? A. Oh, yes; yes.

(Deposition of Vernard Soper.)

Q. Why did you stop using tags similar to Plaintiff's Exhibit 2 after July 1, 1944?

A. Well, they had the name Chicago and New York on them, and I was manufacturing, after that period I manufactured for the Vancouver office. I presume they were not interested in advertising Chicago and New York.

Q. By "they", whom do you mean?

A. Mr. Hughes, of the International Electric Fence Company at Vancouver.

Q. Did you previously testify to the fact that Mr. Hughes primarily redesigned—that is what he calls it, a label to place on his equipment? [421]

Mr. Boldt: No, I don't think that is a correct statement of it. He didn't say anything about redesigning of it. I would object to the form of the question for that reason.

Q. (By Mr. Snow): Mr. Soper, didn't you testify that Mr. Hughes designed a label to go on his equipment? A. Yes; yes.

Q. When was that?

A. Oh, that was after Mr. Turk had sold out to him.

Q. After July 1, 1944?

A. Yes. Was that when he sold? Yes; that took place some time in the winter of 1944 and 1945. I don't remember just exactly when that happened, but it transpired then.

Q. Did Mr. Turk, to your knowledge, ever manufacture any fence controllers during the period 1940 to 1944?

(Deposition of Vernard Soper.)

A. No, I don't think Mr. Turk did any manufacturing. I believe he made up a few that he was experimenting with out there, and rebuilt the merchandise that had been returned; you might say assembly of units. I believe that continued for some time, until all the old units were off the market, either had been junked or rebuilt to satisfy the customers. Just exactly when that terminated, I don't know; but I would imagine somewhere in 1940 or 1941.

Q. To whom did you sell most of your fence controller [422] equipment that you manufactured here in Chicago, for the period 1941 to July 1, 1944?

A. Well, most of it—I believe you mean 1943, don't you?

Q. I am sorry; it would be 1941 to 1943.

A. Well, I sold most, almost all my products then went exclusively, or at least were invoiced exclusively to the Vancouver office of the International Electric Fence Company.

Q. Could you tell us some percentages?

A. Oh, I suppose probably eighty-five or ninety per cent; maybe more than that. I don't remember, it is quite a while ago.

Q. What was the percentage of your total production that was sold to the Vancouver office for the period June 1, 1943, to June 1, 1944?

A. What was the percentage?

Q. Yes.

(Deposition of Vernard Soper.)

A. Well, there wasn't any sold from the Electric Service Systems at that time; the Electric Service Systems sold to the Chicago office, and the Chicago office did the invoicing to the Vancouver office; and the percentage, I don't know.

Q. Can't you give us an estimate?

A. Oh, I suppose, probably sixty per cent, or something [423] like that.

Q. The period I am referring to, Mr. Soper, is June 1, 1943, to June 1, 1944, when you were a partner of Mr. Turk; would you please consider that period once again and see if you can remember more definitely as to the amount of your total production that was sold to the Vancouver office?

A. Well, there wasn't any sold to the Vancouver office by Electric Service Systems; all our shipments were made—all our invoices were directed to the Chicago office, so I don't presume you would call my manufacturing sales to the Vancouver office.

Q. Do you know the percentage of the total production of the partnership that went to Vancouver, Washington?

A. No, I don't; not in that period of June 1, 1943, to June 1, 1944. I know that it was a big majority, went to the Vancouver office. However, this office also sold a considerable amount of merchandise to Idaho and California; and just the percentages, I couldn't give it to you except that that whole Western territory took a majority,

(Deposition of Vernard Soper.)

eighty or ninety per cent, I would say, of fencers sold by the Chicago office. Now, at this time the Electric Service Systems at Minneapolis was producing considerable electric fence controllers and selling to outlets in and near Minneapolis, and surrounding territory. [424]

Q. To whom were you selling in Idaho and California?

A. Mr. E. A. Wyatt, and Mr. Charles Klint. Mr. Klint was in California and Mr. Wyatt was in Idaho.

Q. Mr. Soper, I previously have handed you a paper which I had identified as Plaintiff's Exhibit 1, which purports to be a copy of a partnership contract between you and Mr. Turk; do you have a signed copy of that document?

A. Yes, I believe I do.

Q. Would you be willing to send that to me, so that I might be able to substitute it for this carbon copy, that is unsigned?

A. Well, I presume so, or a facsimile of it; I could have a photostat made, or something like that.

Mr. Snow: Mr. Boldt, would you stipulate that a photostatic copy of the document purporting to be a partnership agreement between Mr. Soper and Mr. Turk, dated June 1, 1943, may be substituted in evidence for Plaintiff's Exhibit 1?

Mr. Boldt: That is correct; we make no objection to the fact that it is a copy. Now, whether it

(Deposition of Vernard Soper.)

is otherwise admissible, or not, would be something else. But we would not question the fact that it was a copy.

Mr. Snow: So that I can substitute that when it arrives? [425]

Mr. Boldt: Yes.

Mr. Snow: Shall we, for the purpose of identification, ask Mr. Soper to place his initials and the date on, for instance, each page of the photostatic copy, for the purpose of identification?

Mr. Boldt: Yes; just put on each page true copy, and sign his name.

Mr. Snow: That is, after it is photostated.

Mr. Boldt: Yes.

Recross-Examination

By Mr. Boldt:

Q. Mr. Soper, I think perhaps it already appears, but I want to be very sure about it, and consequently want to ask you again about this metal tag, one copy of which is here as Plaintiff's Exhibit 2, and on which under the name International Electric Fence Company there appears Chicago, Illinois; New York, New York; Vancouver, Washington. As I understand it, tags of that kind, on the fencers that were being manufactured and sold by either you or Turk or Hughes, were being used on those products from 1939 on? A. Yes, sir.

Q. In other words, for a period of two years prior to [426] the incorporation of the Washington business, the tags that were used on the products

(Deposition of Vernard Soper.)

carried the name Vancouver, Washington, as well as the other names, did they not?

A. Yes, sir; the design was just a little different, such as the Exhibit 3; but the general outline of the wording, and so forth, was similar.

Q. That's right; and included the words Vancouver, Washington, as being a concern that was manufacturing and distributing the product?

A. Yes, sir.

Q. And the name that was given as manufacturing the product was International Electric Fence Company, with the three cities below?

A. Yes, sir.

Q. And therefore, up to July of 1941, or October, 1941, when the Washington corporation was organized, the products which had previously been distributed by Turk under the name of International Electric Fence Company, an individual, were carrying the names of Vancouver, Washington, on them, just as shown here on this exhibit, were they not?

A. Yes, sir.

Q. And that had gone on for a period of at least two years prior to the time that the Washington corporation was organized; is that correct?

A. Yes, sir. [427]

Q. I notice in this partnership agreement between you and Turk that there are provisions in there to the effect that each of you was required to diligently employ yourself in the prosecution of the partnership business, and various other pro-

(Deposition of Vernard Soper.)

visions to that effect; was it your understanding that you and Mr. Turk were each obligated to devote the whole, or substantially the whole, of your time to the affairs and business of the partnership here in Chicago?

A. Yes, sir; Chicago and Minneapolis, the two places.

Q. Did you know that at that very same time, and during the period of your partnership, Mr. Turk was on the salary payroll of the Washington corporation, on a substantial salary during all that time?

A. Well, I knew he was getting something out of the set-up out there, which was supposed to be turned into the business here and divided in some manner.

Q. Oh, whatever he got out of the Washington corporation was to be turned into your partnership here?

A. As I remember it; I am not too sure about that, but, as I remember it, there was some agreement we had on there, that we would take our moneys and divide it as near equal as we could, for the benefit of our individual selves, and also to get away from any taxation that might be excessive on one or the other party. [428]

Q. But the point I am getting at is that your understanding of the agreement with Turk was that he was to turn all of the money that he derived from the Washington operation into your

(Deposition of Vernard Soper.)

partnership here in Chicago; was that the understanding?

A. Well, yes, it was, in this: in the sense it was to be divided profits.

Q. Did Mr. Turk ever turn in to you any salary or divided profits from the Washington corporation during that time?

A. No, there wasn't any actual money, only just as the profits from the business out there were supposed to come to us in the way of sales.

Q. I don't care what it was supposed to be; did you get any, that is the question; did you get any divided profits, or did you get any salary that was allowed to Turk?

A. No, I didn't get any salary; I don't know just exactly how that salary was divided, I don't know whether it came in; I don't think so.

Q. Well, did you ever get any conveyed to you or the partnership, the right to acquire that salary if and when it be paid?

A. Well, at that time we used our money.

Q. Just keep your mind on my question: Did you get [429] from Turk, or from anybody, for that matter, any conveyance of the right to draw his salary, if and when it might be paid, out of the Washington corporation?

A. Well, no, there wasn't any—I don't remember of any direct moneys coming from the corporation here as a salary and being put in the bank.

(Deposition of Vernard Soper.)

Q. Well, that is what I am talking about.

A. No.

Q. Either money or the right to receive money if and when it be paid—did you ever get anything like that in your partnership here?

A. Not as a salary, no; I mean, there was no salary came to be put in the bank.

Q. Did you ever get any kind of conveyance or assignment of the right to receive it, if and when it be paid.

A. I don't remember that, no.

Mr. Boldt: Thank you; that is all.

Mr. Snow: It was understood by counsel for the plaintiff that the right to object to any of the questions of counsel for the plaintiff by counsel for the defendants was granted to counsel for the plaintiff in the same manner?

Mr. Boldt: Oh, yes; the stipulation applies both ways, of course.

Mr. Snow: I just have one or two more questions. [430]

Redirect Examination

By Mr. Snow:

Q. Mr. Soper, was it ever, to your knowledge, the intent of the Vancouver office, in the period from 1940 to July 1, 1944, to manufacture electric fence controllers?

A. No, not to my knowledge.

Q. What was the main purpose of that office?

(Deposition of Vernard Soper.)

A. The main purpose, of course, was disposing of merchandise, selling merchandise.

Q. It was a sales office?

A. Yes, it was. They did repair work there; and I think they did experiment, as I mentioned a while ago, they experimented with units of their own particular design. But that was working back and forth with myself here in Chicago.

Mr. Snow: That is all.

Mr. Boldt: Now, it should be explained that the balance of this was taken after the examination of Mr. Turk.

Rerecross-Examination

By Mr. Boldt:

Q. By the way, Mr. Soper, I would like to ask you an additional question, in the light of this examination: Mr. Soper, did you at any time, either in writing or orally, make any conveyance to Mr. Turk of the general character that he has described here in his testimony, to [431] the effect that you conveyed to him a right of use of the name International?

A. No, there was nothing ever conveyed. We just used it, and broke it up as we did when it became the proper thing to do; that is, after it was first organized.

Q. I am speaking of the time that he speaks of, when you and he separated and terminated your partnership, in June of 1944; I believe he testified that you at that time, that he acquired from you

(Deposition of Vernard Soper.)

at that time a right that he did not previously have; namely, the right of the name International as applied to electric fences and allied products; did you at that time—namely, June 1, 1944—convey in any manner whatsoever to Mr. Turk any such right?

A. No, not only just that that was shown; I mean it was just the sale of the business here.

Q. Did you convey to him in any manner whatsoever at that time the exclusive or every right of the use of the name International?

A. No, not only in our signed dissolution.

Q. That's right, in the dissolution papers?

A. Yes.

Q. Did you consider that prior to that time, Mr. Soper, that you had the sole ownership or the right to use the name International, and that neither Hughes nor the Washington corporation nor Mr. Turk had any such right? [432]

A. No; they had an equal right with me.

Q. In the use of that name?

A. Yes; because it was used that way. I presume that is the question, just who had a right?

Q. That's right.

A. We all had it, just used it and specified it, part of our mutual advertisements.

Q. You all had used it prior to that time, hadn't you? A. Yes.

Mr. Snow: Let us specify times.

(Deposition of Vernard Soper.)

Q. (By Mr. Boldt): Prior to June 1, 1944, is that right? A. Yes.

Q. And you did not consider that you had any exclusive ownership in the right to use of that name at that time?

A. No; that is true, there was no division, or no giving or taking. I mean, Mr. Turk had the privilege if he had wanted to use it, to tell me to go—I mean, he could have stated, if he wanted to—I presume he could have pulled away and made his own fencers; or I could have done the same. But our understanding was we would work together.

Q. He testified here a few minutes ago to the effect that at the time you and he terminated your relationship he procured from you, and you conveyed to him, the right to the use of this name International as applied to fencers that he [433] did not previously own, but which was owned by you; is that true, did you make any such conveyance at that time; I have forgotten just what the paper said, but I am sure it was not that.

Mr. Boldt: That is all.

The Witness: It was just a termination of our agreement.

Mr. Boldt: A termination of your partnership?

The Witness: Termination of the partnership.

Mr. Boldt: That is all.

Reredirect Examination

By Mr. Snow:

Q. Mr. Soper, didn't you previously testify that one of the assets of the partnership was the trade mark International? A. Yes, sir.

(Deposition of Vernard Soper.)

Q. And when you dissolved the partnership didn't you sell the entire rights to International to Mr. Turk?

A. Yes, I sold everything to Mr. Turk.

Q. To the exclusion of yourself?

A. Yes; I sold out my whole business.

Q. So that you did not retain any right to the word International, or International Electric Fence Corporation?

A. No; I didn't have rights to use it as a corporation, [434] no; or anything else, for that matter.

Q. You turned those over to Mr. Turk?

A. Yes; when I sold it, I just sold out the business to Mr. Turk.

Q. And that included the right to use the name International?

A. Why, surely; that included a right to use it.
Mr. Snow: That is all.

Further Recross-Examination

By Mr. Boldt:

Q. You didn't undertake to convey anything that was owned by the Washington corporation, did you, to Mr. Turk?

A. No, only my share in the stock, that is all.

Q. But any rights or assets of the Washington corporation, that the Washington corporation might have had, or any rights it might have had in the use of the name International, you certainly did not undertake to convey to Mr. Turk, did you?

(Deposition of Vernard Soper.)

A. No, I didn't have anything to do like that.

Mr. Boldt: That is all.

Mr. Snow: That is all. [435]

Mr. Snow: And then there were some words relating to the signing.

The Plaintiff rests, your Honor.

I understand we will be allowed to make a short argument?

Mr. Boldt: We don't want Mr. Hughes to come back and make a denial, but if there is any——

The Court: What I would like to have, if it is available, is this two thousand dollar check.

Mr. Boldt: I don't think that is available, your Honor. That is a personal check back——

The Court: Not so many years ago.

Mr. Boldt: He doesn't have it here, at least.

The Court: Is there any documentary proof as to when it was paid?

Mr. Boldt: We don't have anything on that here.

The Court: What I am trying to get is, was the check paid simultaneously as the execution of the articles of incorporation?

Mr. Boldt: The latter part of September, a few days before.

The Court: Is there any proof other than the statement?

Mr. Boldt: No, excepting you will notice the memorandum indicates it. That memorandum is dated at the top [436] 1/10/41.

The Court: Yes. Of course, it is not in the nature of a receipt for this money.

Mr. Boldt: Oh, no.

The Court: What is your contention, Mr. Snow, or your client's as to when he received the two thousand dollars?

Mr. Snow: Approximately October 1st, a few days before the 9th when the certificate came back from the Secretary of States.

The Court: But several days prior to the date the minutes were signed.

Mr. Snow: The minutes were signed quite a bit later than that, your Honor. They were signed in November.

The Court: Well, about a month before.

Mr. Snow: About a month before the minutes were signed?

The Court: Yes.

Mr. Boldt: Oh, yes, better than a month. We are in substantial agreement that the payment was made within a day or two of October 1, 1941. That is Mr. Hughes' recollection and I guess it is agreed that that is Mr. Turk's. They both agree to that, that the money was paid by Hughes to Turk on or about October 1, 1941.

The Court: I will hear from you briefly, Mr. Snow. [437]

(Whereupon, argument was made by Mr. Snow, Counsel for the Plaintiff.)

The Court: Will you let me see the three exhibits dealing with the formation of this corporation, the business of incorporating in 1943, together with the minutes of that corporation? Do you know what the Court has in mind, Mr. Clerk?

The Clerk: The articles of incorporation?

The Court: Yes, the minutes.

(Documents handed to Court by Clerk.)

The Court: The fact, gentlemen, that I have asked for these exhibits should indicate how I feel in reference to a decision in this matter so far as going into the third stage of the case is concerned, that is, whether there should be proof offered as to infringement and the extent of damages, if any.

I am convinced that there has been no proof at all as to infringement, which would warrant proceeding into that phase of the case. I am further convinced that a disposition of the case may now be made upon the merits of the issues as here raised in reference to infringement.

I don't want to deny counsel the right to make an argument, either short or extended, but I am satisfied that it will not change my views in the slightest.

This is a trade name case. The suit, generally [438] speaking, is on the equity side of the Court. The allegations are that the Defendant has been infringing upon the rights of the Plaintiff in the use of a trade name that had become a matter of considerable value in the sale of an appliance

heretofore referred to as a "fencer" or "International Electric Fencer."

There has been a great mass of evidence introduced in the two or three days we have proceeded in this trial. Much of it has only remote, if any, relevancy to the major issue here.

The law books are filled with cases on the subject of infringement and improper use of trade marks and trade names but we can find little in them that is helpful here until we determine what the facts are. In all of the cases that I have examined since this matter has been brought to my attention, and in other similar cases that I have tried, involving the general matter of trade mark and trade names, I have never found one where the facts in any two were on all fours. The rules of law governing this type of case are simple, but the decision must rest upon the facts, peculiar to each case.

We have got to go back in this case for a beginning to the year 1938 when the Plaintiff, Mr. Turk, as an individual, together with a Mr. Soper went into this field of operation down in Oregon, and commenced the business [439] with which we are here concerned.

The Plaintiff Turk testifies that possibly Mr. Soper and he jointly had the inspiration, when they started operations, at the same time to choose that the name "International" be used for their product. At one place in his testimony he said

the idea to use this trade name was his own and, while he readily admitted that elsewhere in the United States the same name was being used on the same type of product, that such use was without his knowledge.

Turk, Hughes and Soper, these three, are the moving individuals in this picture. Actions were taken in these early days of this business as individuals and not as corporations. Mr. Turk testifies that he and Soper, along in 1938 or 1939 organized an Oregon corporation using the name "International" in the corporate set up and their plan was to manufacture and distribute these electric fences.

That business went along for a year or two quite unsuccessfully. The indications are that the business was a failure and that they abandoned the Oregon corporation. Whatever interests Mr. Soper had in the Oregon corporation, he let them go and they meant nothing to him. The corporation, to use his words, "died on the vine".

Mr. Turk went to Vancouver, Washington, across the river from Portland, and continued with the idea that he [440] had something of value to himself and the general public and by 1940—and I am not going to be bound exactly by the year—Mr. Hughes comes into his life as an employee, because he, Turk, is evidently beginning to realize somewhat substantial profits in the undertaking, and he was required to expand his business, so Mr. Hughes was employed as bookkeeper.

The relationship of employer and employee apparently was agreeable and progressed nicely until 1941 when the suggestion—and I have no hesitancy in saying that it came from Mr. Hughes—was made that they ought to go into business together rather than for Hughes to continue as bookkeeper and Turk as operator. Without attempting to go into the details disclosed by the evidence, they did agree upon setting up a corporation.

In checking as to what Mr. Turk had to bring to the corporation and what Mr. Hughes had to give to the corporation, I am satisfied that qualified lawyers were consulted, when these men reached that stage of the proceedings where they were going into business together. It appeared that Mr. Turk had approximately four thousand dollars in net assets in his business. A corporation was planned that would have a capital stock whose par value would be four thousand dollars, divided into four hundred shares at ten dollars each. Mr. Hughes had sufficient cash [441] to take care of the cost of fifty per cent of this capital stock and he therefore subscribed to fifty per cent of it and Mr. Turk the other fifty per cent. The cash from Hughes, however, did not go into the treasury but went to pay Mr. Turk for his half of the assets of the new corporation, so they then became equal owners of the corporation.

Up to this point little, if anything, had been said about trade name by either Mr. Turk or Mr. Hughes.

There was some type of relationship in operations they conducted for the next ten days following their oral agreement to work together before the corporate structure came into being. That relationship was not that of employee bookkeeper and employer manager, therefore must have been an implied co-partnership.

Then we come to where the articles of incorporation were drafted and signed and the first annual meeting of the directors. There are two short typewritten pages, which recite that "R. H. Turk and G. N. Hughes have heretofore owned certain assets as co-partners". This is as of the fourth day of November. The two thousand dollars had been paid by Hughes to Turk some time before that and the business was being carried on by Turk and Hughes. There is no dispute that it was sometime before the fourth of November.

They went into business in Vancouver as an electric [442] fence company and built up a business and created a good will. The minutes recite that: "The said assets consisted of machinery, equipment, good will, accounts receivable". The minutes further recite that: "Said G. N. Hughes and wife and R. H. Turk and wife then offered to convey to the corporation all of the assets of said co-partnership in full payment of the capital stock subscribed by R. H. Turk and wife and G. N. Hughes and wife. It was thereupon duly moved, seconded, and carried that the best interests of the company

would be furthered by accepting the offer. That the reasonable value of the said assets is four thousand dollars, and the officers of the corporation were thereupon instructed and authorized to issue to the stockholders common stock in payment of said assets, and that their stock subscriptions were considered paid in full”.

This document is signed by Mr. Turk as President and Mr. Hughes as Secretary.

Now, one of the problems the Court has to determine is; are we going to ignore this recitation in the minutes. Are we warranted under the evidence that has been submitted here, to conclude that the formal, serious, solemn words contained in a document, at the beginning of a corporate picture mean nothing? It is true that Mr. Turk said he didn't know what was in the minutes, but the Court has no hesitancy in saying that Mr. Turk must have [443] known. He is not an individual of such low mental calibre that he would place his name to the second most important document, in a business that in the three years following the organization of the corporation showed a net profit conceivably in the sum of thirty thousand dollars, or more, for each year. The facts in this case convince this Court that there was a relationship in the dealing between these two men prior to the effective date of this document, and the execution of the articles of incorporation, that could well be classified as a co-partnership, even though it was

for a few days, and the assets of such co-partnership became the property of the newly formed corporation.

We come to the next question and that is this: When this "good will" was transferred by this Plaintiff Turk to this corporation, did he transfer any rights in the trade name? He said he couldn't, because he didn't have them. Now, that makes it necessary to go over the evidence as it was submitted here and the facts as the Court finds them, drawing what would appear to be logical inferences from the testimony.

In 1938, when this name was first thought of, Soper was an active participant in the affairs of the Oregon corporation and then, later, merely stepped out of the picture entirely and nothing was transferred by Soper to Turk or by Turk to Soper when that corporation ceased to [444] exist, but they both had a prior right to use of the trade name "International" insofar as it involved these electric fencers. Mr. Turk continued his efforts as an individual and then transferred his individual assets, with whatever degree of success he had had in the use of the trade name, to the corporation. He had a part interest in this trade name at all times. Mr. Soper says that he has no interest in it, and doesn't claim any interest in the trade name insofar as the selling end of the business is concerned. The effect of Soper's testimony is very damaging to the contention of the Plaintiff and

supports the contention of the Defendant, because he says, "I had nothing to do with sales in 1938. Mr. Turk was the entire sales part of the business". And he testified that he never conveyed anything to Turk in 1943, or at any time. The Oregon corporation had the name, together with himself and with Mr. Turk. And then Mr. Soper takes the position that in his manufacturing endeavor at Minneapolis he can sell to anyone, and use any trade name they request.

When the Plaintiff, Turk, disposed of his interests in this corporation in 1944, he received a substantial sum of money for a business that started with a capital of four thousand dollars, and the stock had a value of, well, a very substantial sum. I am not so sure. Thirteen or fourteen thousand dollars, as I recall it, [445] plus an additional obligation against the corporation still in existence but not yet payable.

The only documentary proof of just what the terms of the sale were is this little scrawled memorandum as they sat together out in the company's truck. Plaintiff Turk says that he had rights in the trade name that he reserved but not by express reservation. From extracts from memorandums, and letters made thereafter, and some before, it is indicated that there was substantial antagonism between the parties, and it grew as time went on until it ripened in litigation in the State Court which determined rights of this Plaintiff in certain matters

which this Court has held were *res judicata*. I might add in passing, that some allegations in that complaint in the State Court action are highly inconsistent with some allegations in this complaint.

I don't know that any good purpose would come from an extensive review of the evidence.

There were only three witnesses who testified, one by deposition and the two, the principles, who testified orally, and there are inconsistencies in all the testimony, but upon major issues, as to the origin of this trade name, its transfer by implication, because it was never transferred by a written document, nor even by word of mouth, and as to matters that occurred during the years 1941, 1942, [446] 1943 and 1944, the testimony of the Defendant Hughes is more persuasive to this Court, by far, than the testimony of the other two. In Mr. Turk's statements there are many inconsistencies; statements that are inconsistent with the actions of a person who is willing to tell the whole truth about a transaction. So, in the very material features of this case, where there is a conflict between the testimony of these two men, I find that the testimony of Hughes is more reliable. Doing so, there is nothing left in this case but to dismiss the Plaintiff's action and find that both he and the Defendant are entitled to a joint use of this trade name.

The facts are quite strong that throughout the whole life of the corporation, from the time of its inception until Turk stepped out of it, he retained certain rights, but they were not exclusive.

As a Court of equity, I can not find that one had rights to the exclusion of the other.

I find Turk left with the corporation a right to use this trade name when he sold his interest in the corporation.

No doubt each one thought he had exclusive rights but neither did anything consistent with a man having exclusive rights.

The facts are insufficient to warrant this Court to find [447] that Hughes lost his right to sell and it is particularly easy to find that, in view of the testimony of the witness Soper who manufactured the product and said he was free to manufacture the product and sell it to whomever he pleased.

There is no evidence in here that warrants a finding that the right of using the trade-name extends as far east as the State of Texas, by use of the words "Western States." By Western States, as near as I can gather from this evidence, was meant those states consisting of Washington, Oregon, Montana, Wyoming, Colorado, and down into New Mexico.

Mr. Boldt: That would be the States in which the Defendant filed, excepting Texas.

The Court: Yes. Now then, as to costs in this action, I am inclined to believe that I should not assess costs to either party because neither has prevailed fully on their contentions, so in the decree that you prepare you can prepare without

costs to either party and both parties will be allowed exceptions.

Mr. Snow: Your Honor will enter an order at this time that the exhibits may be retained by counsel subject to inspection by other counsel in the event of appeal? I don't think that the clerk wants them.

The Court: Under the rule now prevailing, the exhibits [448] all go to the Court of Appeals.

Mr. Snow: That is correct. I say, subject to appeal.

Mr. Boldt: We can leave them there until you make up your mind and then I can get an order and ship them back to you.

The Court: The Court will assure you that it will give you such an order at any time that you want it.

Mr. Snow: Thank you.

Mr. Lyon: Your Honor, there is one other question. Would the Court indicate as to the rights of the Plaintiff as to the remaining part of the United States? Nothing was said.

The Court: You mean east of the Rocky Mountains?

Mr. Lyon: Yes.

The Court: If I didn't, I meant to indicate that the Defendants have no rights.

Mr. Boldt: And excluding Texas?

The Court: Yes. Court will be adjourned.

(Whereupon, at 5:00 o'clock, p.m., January 17, 1949, hearing in this case was adjourned).

CERTIFICATE

I, Earl V. Halvorson, official court reporter for the United States District Court, Western District of Washington, Southern Division, hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ EARL V. HALVORSON.

[Endorsed]: Filed June 15, 1949.

CLERK'S CERTIFICATE TO RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 11, as amended, of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) of the Federal Rules of Civil Procedure, as amended, I am transmitting herewith as the Record on Appeal in the above entitled cause all of the original pleadings on file and of record in said cause in my office at Tacoma, Washington, as set forth below:

1. Complaint (1)
2. Summons and Marshal's return thereon (2)
3. Non-resident Cost Bond (3)
4. Demand for Costs Security, Motion to Make Complaint More Definite and Certain and to Strike (4)
5. Amended Complaint (5)

6. Motion to Strike and to Make More Definite (6)
7. Notice of Argument (7)
8. Order Overruling Defendant's Motion to Strike and to Make More Definite and Certain (8)
9. Answer (9)
10. Motion for Early Assignment for Trial (10)
11. Notice of Argument (11)
12. Amended Answer (12)
13. Motion for Early Assignment for Trial (13)
14. Notice of Argument (14)
15. Motion for an Order Requiring a Reply (15)
16. Notice of Argument (16)
17. Memorandum in Support and Motion to Require a Reply (17)
18. Deposition of R. H. Turk (18)
19. Deposition of Vernard Soper (19)
20. Order Extending Time for Filing Statement of Objections (20)
21. Stipulation and Order re time for presenting Decree (21)
22. Findings of Fact and Conclusions of Law (22)
23. Decree (23)
24. Letter to Clerk from W. A. Snow dated 3-16-49
25. Notice of Appeal (24)
26. Motion for Order Extending Time for Filing Transcript with Circuit Court of Appeals (25)
27. Notice of Argument (26)
28. Order Extending Time for Filing Transcript with Circuit Court of Appeals (27)

29. Motion to Permit Plaintiff to File Cost Bond on Appeal (28)
30. Notice of Argument (29)
31. Reporter's Transcript of Proceedings of 1-17-49 (30)
32. Order Permitting Plaintiff to File Cost Bond on Appeal (31)
33. Bond for Costs on Appeal (32)
34. Statement of Points which Appellant intends to rely on Appeal (33)
35. Stipulation of Parties as to matters to be included in Record on Appeal (34)
36. Motion for Order to Transmit Original Exhibit (35)
37. Order to Transmit Original Exhibits (36)
38. Reporter's Transcript of trial held 1-13-49 (37)

I do further certify that as part of the Record on Appeal, I am transmitting herewith, pursuant to order of Court, the following original exhibits, offered in evidence in the trial of the above entitled cause, to-wit:

Plaintiff's Exhibits 1 to 27, inclusive, and

Defendant's Exhibits A-1 to A-13, inclusive and that said exhibits and the original pleadings and papers constitute the Record on Appeal from the Decree of the said District Court (except that part where it is adjudged that plaintiff corporation is the true and lawful owner of Certificate of Registration No. 424,467 registered October 8, 1946) filed on February 18, 1949 and entered in the civil docket of said cause February 18, 1949.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington this 15th day of June, 1949.

[Seal] MILLARD P. THOMAS, Clerk,
By /s/ EDGAR SCOFIELD, Deputy.

[Endorsed]: No. 12270. United States Court of Appeals for the Ninth Circuit. International Electric Company, Appellant, vs. International Electric Fence Co., a Washington corporation and George N. Hughes, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed June 16, 1949.

PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals for
the Ninth Circuit

Civil Action No. 12270

INTERNATIONAL ELECTRIC COMPANY, an
Illinois corporation,

Appellant,

vs.

INTERNATIONAL ELECTRIC FENCE CO., a
Washington corporation, and GEORGE N.
HUGHES,

Respondents.

APPELLANT'S DESIGNATION OF MATTERS
TO BE PRINTED IN RECORD ON APPEAL

To the Clerk of the Court of Appeals for the Ninth
Circuit:

Pursuant to the rules of the above entitled
court, the appellant, International Electric Com-
pany, hereby designates as the portion of the rec-
ord, proceedings and evidence to be contained in
the printed Record on Appeal, to-wit:

- (1) Amended Complaint filed June 9, 1948.
- (2) Amended answer of defendants filed Octo-
ber 2, 1948.
- (3) Findings of Fact and Conclusions of Law
dated February 18, 1949.
- (4) Final Judgment dated February 18, 1949.
- (5) Notice of Appeal dated March 16, 1949.
- (6) Statement of Points on which Appellants
intend to Rely on Appeal.

(7) Order extending time for filing transcript with Circuit Court of Appeals; order permitting plaintiff to file Cost Bond on Appeal.

(8) Stipulation of parties as to Record on Appeal.

(9) Certificate of Clerk of the District Court.

(10) Transcript of the Proceedings taken in open Court.

(11) The documentary exhibits received in evidence.

Plaintiff's Exhibits

1. Turk-Soper Partnership Agreement
2. Certificate of Trade-Mark
4. Letter charging infringement, May 26, 1947
3. Assignment, Turk to Plaintiff, May 26, 1945
13. Letter charging Hughes with infringement, October, 1946 by A. J. Fine
14. File wrapper and contents Hughes application for registration of Trade-mark "International"
15. Letter dated July 24, 1944, from Hughes to Turk
16. Letter dated July 31, 1944 from Hughes to Turk
17. Letter dated Sept. 9, 1944 from Hughes to Turk
18. Letter dated Sept. 20, 1944 from Hughes to Turk
19. Letter dated Nov. 18, 1944 from Hughes to Turk
20. Letter dated Mar. 13, 1944 from Hughes to North Mercantile Company

21. Letter dated Sept. 2, 1943 from Hughes to Turk
22. Letter dated July 24, 1943 from Hughes to Turk
23. Letter dated Sept. 16, 1944 from Hughes to Turk
24. Circular of Defendant
25. Advertisement of Defendant published 1945
26. Letter of Defendant dated May 23, 1944 to Turk
27. Credit memorandum for \$13,000 from Turk to Hughes

Defendant's Exhibits

- A-7. Minutes of First Annual Meeting, International Electric Fence Co., November 4, 1941
- A-8. Sheaf of Letters
- A-9. Sheaf of Letters
- A-10. Proposed Form of Agreement
- A-11. Liability and Asset Sheet dated October 1, 1941
- A-12. List Price defendants mailed to dealers.

Dated, this 28th day of June, 1949.

RUMMLER, RUMMLER &
SNOW,

/s/ BURTON W. LYON, JR.,

Attorneys for Appellant.

Copy of foregoing received this 29th day of June, 1949.

METZGER, BLAIR, GARDNER
& BOLDT,

Attorneys for Respondents.

[Endorsed]: Filed June 30, 1949.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated by and between International Electric Company, an Illinois corporation, appellant in the above entitled action, by and through its attorneys, Rummmler, Rummmler & Snow and Burton W. Lyon, Jr., and the International Electric Fence Co., a Washington corporation, and George N. Hughes, respondents in the above entitled action, by and through their attorneys, Metzger, Blair, Gardner & Boldt, that the following exhibits of the plaintiff and the defendants which were introduced in evidence in the proceedings in the above entitled action in the District Court of the United States, Western District of Washington, Southern Division, may be introduced in the appeal proceedings in the above entitled court as physical exhibits:

Plaintiff's Exhibits

5. Defendants' Labels
6. Plaintiff's Label
7. Plaintiff's Label
8. Plaintiff's Label
9. Defendants' Devices
10. Defendants' Devices
11. Defendants' Devices
12. Defendants' Labels

Defendants' Exhibits

- A-1. Transcript Clark County proceedings
- A-2. Findings Clark County Case

A-3. Portions of Testimony Clark County Case

A-4. Additional Portions of Testimony, Clark
County Case

A-5. Two Stock Certificates

A-6. Copy of Articles of Incorporation of In-
ternational Electric Fence Company

Dated, this 18th day of July, 1949.

RUMMLER, RUMMLER &
SNOW,

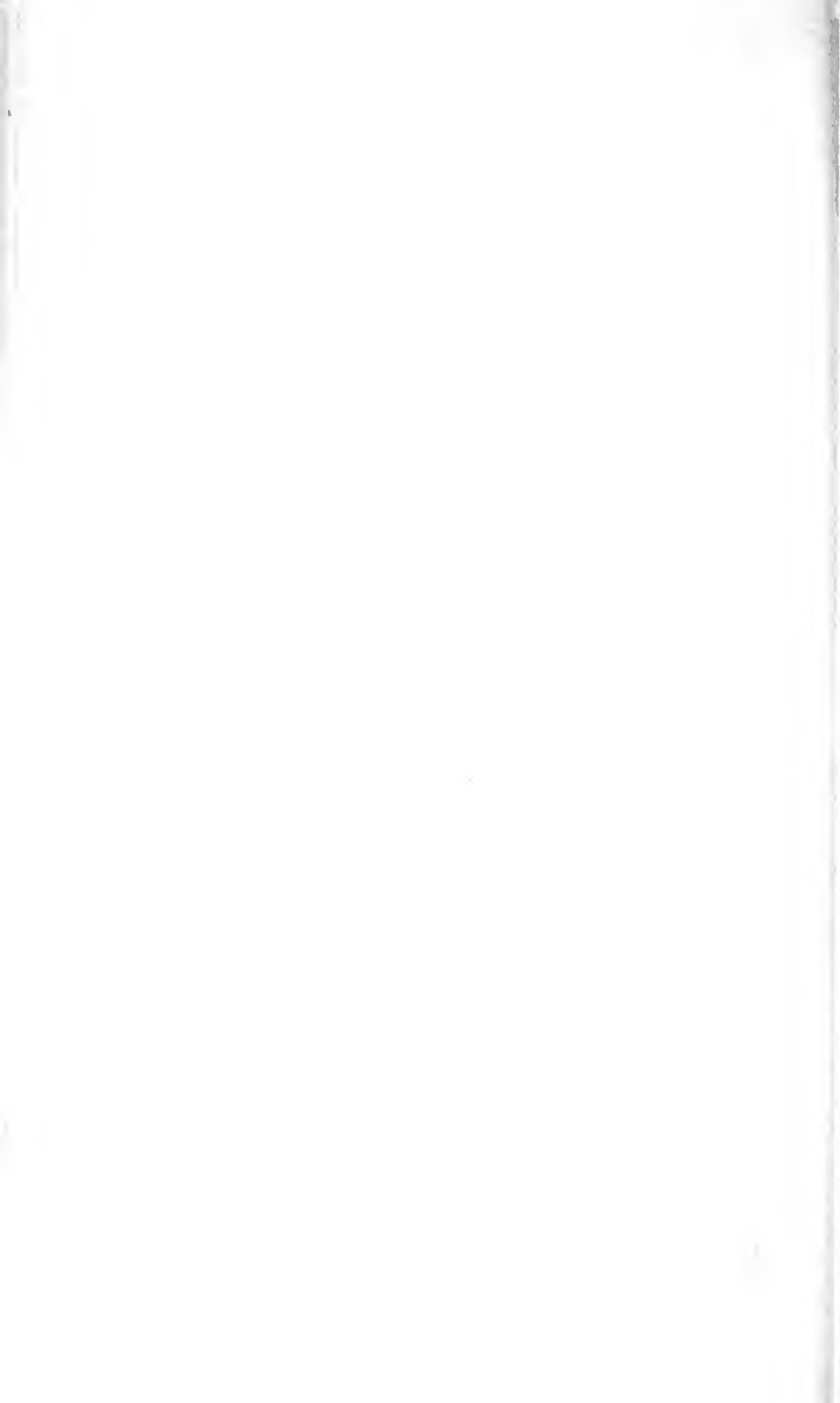
/s/ BURTON W. LYON, JR.,

Attorneys for Appellant.

METZGER, BLAIR, GARDNER
& BOLDT,

Attorneys for Respondents.

[Endorsed]: Filed July 20, 1949.



IN THE
United States Court of Appeals

For the Ninth Circuit

No. 12270

INTERNATIONAL ELECTRIC CO.,
Plaintiff-Appellant,

vs.

INTERNATIONAL ELECTRIC FENCE CO.,
Defendant-Appellee.

Brief for Appellant.

FILED
DEC 7 1949
PAUL P. O'BRIEN,
CLERK

WILLIAM A. SNOW,
7 S. Dearborn Street
Chicago 3, Illinois



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IN THE
United States Court of Appeals
For the Ninth Circuit

No. 12270

INTERNATIONAL ELECTRIC CO.,
Plaintiff-Appellant,

vs.

INTERNATIONAL ELECTRIC FENCE CO.,
Defendant-Appellee.

BRIEF FOR APPELLANT.

This is a trade-mark case, involving the registered trade-mark "International," as used on Electric Fences, Stock Prods and Electric Fence Controllers. This trade-mark was registered in the United States Patent Office on October 8, 1946 by R. H. Turk and Certificate of Registration No. 424,467 was duly granted him. (Rec. 93)

The jurisdiction of the District Court was based on the fact that the cause of action arose under the Trade-Mark Laws of the United States (U.S.C. Title 35, Sec. 97) and because of diversity of citizenship of the parties. (Amended Complaint Rec. 2, 3).

As to the unfair competition phase of the case (Amended Complaint Rec. 6) the District Court had jurisdiction as provided by U.S.C. Title 28, Sec. 1338. This Court has appellate jurisdiction as provided by the statutes. (U.S.C.

Title 15, Sec. 97; U.S.C. Title 28, Sec. 1291) because of the entry of the Final Decree (Rec. 22) by the District Court on February 18, 1949 and this Appeal being taken in proper time (Rec. 24).

STATEMENT OF THE CASE.

R. H. Turk d.b.a. International Electric Fence Co. registered the trade-mark "International" in the United States Patent Office in Class 21, Electrical Apparatus, Machines and Supplies for use on Electric Fences, claiming continuous use in interstate commerce since January 1, 1938. The Certificate was granted on October 8, 1946 as Registration No. 424,467 (Rec. 93), and it was duly and properly assigned to appellant (Rec. 94).

Appellee is using the identical trade-mark for the identical goods in its business.

On April 4, 1945 and May 26, 1947, Appellant, through its attorneys, by letters (Rec. 96, 146) notified Appellee that its use of Appellant's trade-mark was an infringement of its rights and demanded that Appellee cease using said trade-mark "International."

Appellee did not reply to either of the aforesaid letters or accede to Appellant's requests contained therein and this litigation ensued. The original Complaint was filed in the District Court at Tacoma on November 3, 1947 and because of a series of pleadings Appellant subsequently filed its Amended Complaint (Rec. 2) on June 9, 1948, charging infringement of its registered trade-mark and unfair competition, and Appellee filed their Amended Answer on October 2, 1948 denying all the material allegations set up in the Complaint but admitting jurisdiction; the registration of Appellants trade-mark; use in interstate commerce by Appellee of the mark and on iden-

tical goods; and receipt of Notice of Infringement. (Rec. 9, 10) Appellee set forth as affirmative defenses (1) the question of *res adjudicata* (Rec. 11) which defense was overruled by the lower court (Rec. 59) before the trial on the merits and (2) estoppel (Rec. 12). This cause was tried in open court on January 13, 14 and 17, 1949 and decided by His Honor Judge Charles H. Leavy on January 17, 1949 in a bench decision (Rec. 518 et seq.) deciding in substance that Appellant was the true and lawful owner of the Certificate of Registration No. 424,467 and had the right to use the trade-mark exclusively throughout the United States except that Appellee had the right to concurrently use the trade-mark "International" in eleven Western States alongside Appellant. On February 18, 1949 Findings of Fact, Conclusions of Law (Rec. 15) and Final Decree (Rec. 22) were signed by the Court.

SPECIFICATION OF ERRORS.

1. The lower court erred in finding Appellee and their predecessors in business, adopted and continuously used in interstate commerce ever since on or about January 1, 1938, the trade-mark "International" as a trade-mark for electric fences, fence controllers, stock prods, insect and fly traps and electric heaters (Findings of Fact No. VI, Rec. 17).

2. The lower court erred in finding that one of the assets of the International Electric Fence Co., a Washington Corporation when it was organized on October 9, 1941 by R. H. Turk and his wife and G. N. Hughes and his wife, included the right to use the trade-mark "International" as applied to electric fences and goods having the same descriptive properties, in the States of

Idaho, Washington, Oregon, California, Utah, Nevada, Montana, Wyoming, Colorado, Arizona and New Mexico. (Findings of Fact IX Rec. 18-19).

3. The lower court erred in finding that after July 1, 1944, Appellee owned and now owns and has the right to use the trade-mark "International" on the goods in the States enumerated in paragraph 2 above (Findings of Fact No. X Rec. 19-20; Conclusions of Law No. 3, Rec. 23).

4. The lower court erred in finding that under and by virtue of an alleged agreement and by the conduct of the parties and their predecessors in business and interest, Appellee owns and holds and has the right to concurrent use of the trade-mark "International" as applied to the goods and in the States enumerated in paragraph 2 hereinabove (Findings of Fact No. XI Rec. 20).

5. The lower court erred in finding that Appellee did not unfairly compete with Appellant (Findings of Fact No. XII, Rec. 20).

6. The lower court erred in not finding Appellee was guilty of infringing Appellant's trade-mark "International," Registration No. 424,467. (Rec. 28)

7. The lower court erred in not allowing Appellant the right to establish and prove a prima facie case of unfair competition (Rec. 28).

ARGUMENT.

Plaintiff Appellant is the True and Lawful Owner of Trade-Mark "International" Registered October 8, 1946 Certificate No. 424,467.

There is apparently no controversy that Appellant is the true and lawful owner of trade-mark "International" registered October 8, 1946, Certificate No. 424,467 (Rec. 9) (Decree Rec. 23).

The registration of a trade-mark under the provisions of the Trade-Mark Act of 1905 is prima facie evidence of ownership (U.S.C. Title 15, Sec. 96). The mark is used extensively by Appellant not only throughout all the United States but in foreign commerce as well (Rec. 330).

Appellee admits use of the identical trade-mark in interstate commerce on fence controllers and stock prods. (Amended Answer Rec. 10)

Therefore Appellant has made out a prima facie case of trade-mark infringement. (Rec. 103).

Appellee's Defence.

In an attempt to make out a case in favor of Appellee, Appellee has attempted to prove that the Washington Corporation is vested with the right to use the trade-mark "International" because at the formation of this corporation in 1941, the articles of agreement to incorporate stated that the stock was subscribed for by the Appellee Hughes and his wife, and paid for by check in the amount of Two Thousand Dollars (\$2,000.00), while Mr. Turk and his wife received their stock in return for turning over the assets of a business that Mr. Turk had operated prior to that time as an individual doing business as International

Electric Fence Company and part of those assets included the trade-mark "International." This latter fact, Appellant denies and it is believed such an allegation is not supported by the evidence or testimony in this matter.

The Issues.

To limit the issues in this matter, the lower court stated during the trial of the case:

"I hope I make myself clear. At the opening of court this morning *the defendant conceded that he was not entitled to an exclusive use of the trade-name in the Western States*, which is a term sufficiently inclusive to include Washington and Oregon, *but that he is entitled to a joint use of this trade-name in the Western States*, and then when he was asked to enumerate what he meant by "Western States" he said in those States in which he made a filing of the trade-name, and so you have the questions, *first, was he entitled to the use of the name at all, and if so, was such a joint use?* Then, if he wasn't entitled to any use of the trade-name in the territory that has been designated "the Western States", is he entitled to the trade-name, either exclusively or jointly in the States of Washington and Oregon, and whatever he is entitled to in the States of Washington and Oregon, which is part of the Western States is what the corporation is entitled to if there has not been a reservation of the trade name by the original owner * * * those are the issues." (Rec. 325). (Italics ours)

The corporation referred to in the above quotation is the Appellee corporation and "he" referred in the above entitled paragraph refers to the party Hughes President of Appellee corporation.

Trade Mark vs. Trade Name

As will be appreciated from a thorough reading of the foregoing paragraph, it will readily be apparent that

the word "trade-name" is employed instead of "trade-mark." This is true throughout the testimony in this matter on the part of the Appellee as well as on the part of the Court. There must be a differentiation made between the word "trade-name" and "trade-mark" since in law they represent two different entities. The trade-name as referred to hereinabove, refers to the corporate name the "International Electric Fence Company" while the trade-mark referred to is the word "International."

A trade-mark must be affixed to the merchandise it is intended to identify; a trade name is not required to be physically attached either to the goods or packages.

A trade-mark will be protected even against innocent infringement; a trade name, only against fraudulent simulation.

To some extent the terms "trade-mark" and "trade name" overlap; but there is a difference more or less definitely recognized, which is, that, generally speaking, the former is applicable to the vendible commodity *to which it is affixed*, the latter to a business and its good will. *American Steel Foundries v. Robertson, Com. Pats.*, 269 U. S. 372.

The term "trade-mark" has been in use from a very early date, and, generally speaking, it means a distinctive mark of authenticity through which *the producers* of particular manufactures or the vendible commodities of particular merchants may be distinguished from those of others. *Standard Paint Co. v. Trinidad Asphalt Co.*, 220 U. S. 446; *Elgin Watch Co. v. Illinois Co.*, 179 U. S. 665; *Asbestos & Rubber Works v. Scandinavian Co.*, 250 U. S. 644; *Rossmann v. Garnier*, 211 Fed. 401; 128 C.C.A. 73.

One's trade-mark is both a sign of the quality of the article and an assurance to the public that it is the

genuine product of his manufacture. It thus often becomes of great value to him, and **in its exclusive use** the court will protect him against attempts of others to pass off their products upon the public as his. This protection is afforded, not only as a matter of justice to him, but to prevent imposition upon the public. *Amoskaag Mfg. Co. v. Trainer*, 101 U. S. 51; *Feder v. Benkert*, 70 Fed. 613; 18 C.C.A. 549.

A trade-mark's sole office is to indicate that the goods of the same general class to which it is attached emanate **from a single source** or reach the consumer through the same channels of trade. *Hanover Milling Co. v. Metcalf*, 240 U. S. 403.

Appellant appreciates that it has no right to prevent Appellee from using the trade name "International Electric Fence Company" in the State of Washington since it is a corporate name. However, Appellant believes that Appellee has no right under any circumstances to use the *trade-mark* "International" on merchandise having the same descriptive properties as those of Appellant. It was obvious throughout the trial of this case, that the lower court was confused since he repeatedly referred to the "trade-name" of Appellee and not the trade-mark.

Appellee Had Only a Sales Franchise in Washington and Oregon.

Appellant contends, and it believes it proved, that the most Appellee had at the time the Washington corporation was formed in Oct. 1941 (Rec. 66) was a *sales franchise* covering substantially the States of Washington and Oregon, as a *distributor* selling electric fences, electric fence controllers and stock prods bearing the trade-mark "international" (Rec. 121, 122). The merchandise was purchased by the Washington corporation from the manufac-

turer International Electric Fence Company located in Chicago, Illinois (Rec. 67). The goods were not only sold to Appellee corporation but also for other distributors of Mr. Turk throughout the United States (Rec. 67). On just this set of facts alone, it is obvious that Mr. Turk, doing business as International Electric Fence Company prior to the formation of the Washington corporation with Mr. Hughes, did not himself own the trade-mark "International." (Rec. 353) From 1939 to 1943, Mr. Turk merely owned the sales franchise for the Western States (Rec. 424 to 428). The ownership of this trade-mark was vested in the Chicago manufacturer, Mr. Venard Soper. (Rec. 335) Therefore, the premise upon which Appellee bases its case is false to start with.

The Facts Surrounding the Formation of the Washington Corporation.

At this point a review of the facts which led up to the formation of the corporation will be helpful. The following facts have all been stipulated (Rec. 60 et seq.) as being true except where noted. In 1938 Mr. Turk and Mr. Soper formed a corporation under the laws of the State of Oregon (Rec. 62) and sold electric fences and fence controllers wherever sales might be made. (Rec. 63) These electric fences and controllers were made by one Mitchell. (Rec. 63) The Mitchell fence controller was a poorly constructed apparatus and it was constantly being sent back for repairs with the result that the corporation lost money handling these controllers and the corporation ceased doing business and was allowed to expire during the year 1939 (Rec. 63).

During the year 1938 Mr. Soper with the acquiescence of Mr. Turk went to Chicago for the sole purpose of obtaining a plant and manufacturing the equipment which

was to be sold by Mr. Turk in the West. (Rec. 63) Mr. Soper and Mr. Turk agreed between themselves that Mr. Soper would make the merchandise and ship it to Mr. Turk at Vancouver, Washington, and Mr. Turk would sell these products on the West Coast. (Rec. 67) Mr. Soper had the privilege and actually sold these same materials in other States in the Union. (Rec. 67) Therefore, under the circumstances, it is obvious that the trade-mark "International" vested in the manufacturer and not in the sales company or distributorships. As a matter of fact, Mr. Turk awarded the States of Idaho and California to others and in Idaho the distributor called his company the International Electric Fence Company. (Rec. 75) It is far-fetched that under these circumstances and without going into the matter in more detail, that **the manufacturer in Chicago was the one who manufactured the apparatus and applied the trade-mark**, and that the sales organizations in the form of distributorships merely had a franchise to sell in the particular State or States assigned them and as such they had no vested trade-mark rights. Trade name rights, yes, in that they were allowed to call themselves International Electric Fence Company. (Rec. 419)

During the year 1940, Mr. Turk hired the defendant Appellee, Hughes, as a bookkeeper. (Rec. 66) During the summer of 1941 Mr. Turk found himself in strained financial circumstances, owing considerable money to the International Electric Fence Company of Chicago for merchandise and elsewhere. During the late summer and early fall Mr. Hughes, fully appreciating and realizing Mr. Turk's financial condition, propositioned Mr. Turk to allow him to join with Mr. Turk in this venture, and after several propositions Mr. Turk agreed to accept the sum of Two Thousand Dollars (\$2,000.00) as full payment for half of

the capital stock of a corporation to be formed and which is now the Appellee corporation. (Rec. 164) Mr. Turk taking the balance of the stock and putting all of the assets of his business as an individual d.b.a. International Electric Fence Co. into the new corporation. Nowhere in any of the documentary evidence is there any mention made of any trade-mark rights owned or controlled by Mr. Turk at this time Oct. 1941. We have only the unsupported statement of Mr. Hughes on the witness stand that the trade-mark "International" rights were included in this transaction, which statement was denied by Mr. Turk, therefore the testimony of one offsets the testimony of the other. Subsequent letters written by Mr. Hughes to Turk and others, supports Turk's testimony that neither the Washington corporation nor Hughes owned the trade-mark International (Rec. 225, 230, 182, 183, 184, 199). See especially Ex. 18. (Rec. 204, 207)

The fact that Mr. Turk is the registered owner of the trade-mark in the United States Patent Office and the fact that Appellee makes the allegation that they have only a limited right territorially to the trade-mark, the Appellee is charged with presenting proofs by a preponderance of evidence to establish their claim. This they did not do as is evident.

The Washington Corporation was only a bookkeeper for Turk on all transactions without Washington and Oregon.

During the life of Appellee corporation, while Mr. Turk was a fifty percent stockholder, Mr. Hughes was fully cognizant of the fact that the Washington corporation had no right to sell the products of the International Electric Fence Company of Chicago in any States other than Washington and Oregon. Contrarywise Mr. Turk sold the

products of the Chicago company in all of the Western States excepting the States of Idaho and California where he had personally established distributorships as aforesaid. Now, to prove this to be a fact Mr. Hughes' own testimony might even be used for this purpose, but first it must be understood that Mr. Turk testified under oath that the Washington corporation was designated by him to bill, collect and ship all accounts that he sold to, including the distributorships he established in Idaho and California, and in payment for this service Mr. Turk gave the corporation a small percentage of the profit for each item that was sold, to handle the bookkeeping, collecting and shipping of his orders. (Rec. 338) As a matter of fact, there was very little shipping to be done since Mr. Turk drove around in a big panel truck in which he carried the merchandise and usually delivered it right on the spot when he took the order. (Rec. 338) Now, getting back to Mr. Hughes' testimony, which we believe, fully proves the foregoing testimony of Mr. Turk, Mr. Hughes testified that the number 106 fence controllers were purchased from the Chicago manufacturer, Soper, (International Electric Fence Co.) at a cost of Seven Dollars and Fifty Cents (\$7.50). They were sold to distributors and jobbers of Mr. Turk located without the boundaries of the States of Washington and Oregon at a price of Ten Dollars (\$10.00) leaving a total profit on each transaction of Two Dollars and Fifty Cents (\$2.50). Mr. Turk's account, says Mr. Hughes, was credited with Two Dollars (\$2.00), and the corporation received the balance of 50c which was divided equally between Mr. Turk and Mr. Hughes, being the nominal owners of the corporation. (Rec. 224) After several pages of record testimony, (Rec. 217 to 224) it is readily shown that Mr. Hughes attempted to convince the lower court, by using percentages and com-

missions, that Mr. Turk's commission was extremely small compared to the amount the Washington corporation received. Actually Turk received 80% of the profit of those sales plus 50% of the corporation's share or 90% of the \$2.50 profit. The lower court apparently failed to see this point.

Furthermore Hughes, never at any time to date, offered any objection to Turk's use of the trade-mark "International." (Rec. 212) This is highly inconsistent for one claiming ownership like Hughes tries to do now. He even filed an application for registration of the trade-mark "International," (Rec. 148) attempting to thereby secure the exclusive rights to this name, fully knowing Turk was using the trade-mark not only in Washington and Oregon but elsewhere in the United States.

We believe this shows the intention of the witness Hughes to warp the facts to his own advantage.

THE SOPER-TURK PARTNERSHIP.

In 1943, during the second World War period when there was a critical shortage of metal in this Country the Government refused to recognize that electric fences and fence controllers were essential items necessary to the War effort, and therefore, the Washington corporation were without merchandise to sell. Mr. Turk, with the full approval of Hughes, (Rec. 70) went to Chicago to talk with Mr. Soper and the International Electric Fence Company of Chicago for the purpose of trying to see what could be done to obtain metal to increase the production of fence controllers and electric fences. Mr. Soper and Mr. Turk went to Minneapolis and purchased the Electric Service Systems Company and Mr. Turk put up the money therefor and turned over all the accounts he had in other States and a one-half of his interest in the Washington corpora-

tion (Rec. 449). Mr. Turk and Mr. Soper went into partnership. (Rec. 87, 88, Pltfs Ex. 1)

Mr. Soper operated the Electric Service Systems and Mr. Turk operated the Chicago Company. In forming this partnership Mr. Turk agreed to give Mr. Soper fifty percent (50%) of his interest in the Washington corporation, but at the time, the actual transfer of the stock was never made to Mr. Soper. (Rec. 69) One year later in June of 1944, Mr. Soper and Mr. Turk decided to dissolve their partnership and Mr. Soper retained the Electric Service Systems of Minneapolis as his distributive share of the partnership assets. (Rec. 71) Mr. Soper turned back his stock in the Washington corporation to Mr. Turk and gave Mr. Turk the Chicago company, lock, stock and barrel (Rec. 71) including good will, assets and trademarks. (Rec. 457). During the Soper and Turk partnership period while they were the co-owners of the Electric Service Systems of Minneapolis, this company manufactured all the electric fence controllers and accessory items for the Chicago office, but all the merchandise was shipped from Minneapolis to save freight charges. All of the billing for these shipments, however, was done by the Chicago office, *both before and after* the dissolution of the Soper-Turk partnership. (Rec. 505). Under these circumstances, it is obvious that any and all trade-mark rights to the name "International" vested in the Chicago Company since they were the manufacturers and they were the ones who applied the trade-mark to the products. It is believed that any other construction of this situation is fallacious.

THE HUGHES CORRESPONDENCE.

A consideration of some of Mr. Hughes' letters which are part of the evidence, is extremely enlightening.

We call the Court's attention to a letter dated September 2, 1943, Plaintiffs' exhibit 21. This letter was written by Mr. Hughes to Mr. Turk and reproduced at record page 229. It must be appreciated that this letter was written while Mr. Turk and Mr. Hughes were still co-owners of the Washington corporation. Mr. Hughes says:

"If you would place the California territory in our district to be supplied from here as we used to do, except that it would have to be on a fifty fifty basis just as Washington and Oregon, making it part of our territory to oversee" (Rec. 230).

Next we call the Court's attention to a letter dated July 24, 1943 written by Mr. Hughes to Mr. Turk, which letter was also written while the two were still co-owners of the Washington corporation. This letter is reproduced at record page 235. Mr. Hughes says:

"In the event I bought out your interests here it would necessarily have to be understood that I have the exclusive rights of sale in Oregon and Washington, also that I be assured my proportion of controllers based on the actual demands and needs in my territory in comparison with the requirements of the territories of others."

We next call the Court's attention to a letter dated March 13, 1944, which was written by Mr. Hughes to the North Coast Mercantile Company of Eureka, California. This letter was written while Mr. Turk and Mr. Hughes were still co-owners of the Washington corporation and actually sets forth better than any argument that can be expressed, exactly what the business of the Washington corporation actually was and what their rights are. It must be recalled that Mr. Hughes wrote this letter on his own initiative while Mr. Turk was in Chicago. In this letter Mr. Hughes states:

“As indicated to you in our letter of February 10, *this Washington company is limited to handling the International line in the States of Washington and Oregon*, although we otherwise would be very glad indeed to serve your needs. *In order to do this, however, we would have to obtain the permission of the main office in Chicago.*” (Rec. 225) (Italics ours)

We next call the Court’s attention to a letter dated September 2, 1943, written by Mr. Hughes to Mr. Turk, wherein Mr. Hughes says:

“you would be just as well off and save yourself many headaches and uncertainties if you would place the California territory in our district to be supplied from here as we used to do, except that it would have to be on a fifty-fifty basis just as is Washington and Oregon, making it a part of our territory to oversee.” (Rec. 230)

The next letter is dated July 24, 1944 (Plaintiff’s exhibit 15), written by Mr. Hughes to Mr. Turk and reproduced at page 181 in the Record:

“It will readily occur that the chief source of any dissatisfaction which I have had with our past setup in business has been the fact that I have been ‘hamstrung’ for any great investment in business by the fact that *I have been limited in territory to selling electric fences, having only Oregon and Washington.* All my direct and indirect suggestions for giving me more territory to sell these fences have proven to no avail, so I am still thusly limited.” (Rec. 182) (Italics added)

This letter was written *subsequent* to the date that Hughes bought Mr. Turk’s stock in the Washington corporation, and it is obvious that *Mr. Hughes fully appreciated that he was limited only to a sales right in the States of Washington and Oregon.* Mr. Hughes fully was aware of the fact that Mr. Turk and **the Chicago office was the sole**

person who had the right to manufacture the "International" line, and had the sole right to create distributorships in the Western States. This is brought forth in clear and succinct language by Appellee Hughes in the same aforesaid letter appearing at page 184 in the record, when he stated:

"My thought here is that possibly it could be arranged to have Mr. Soper manufacture and assemble and furnish me with the contemplated new unit *while you would assemble and furnish me with the 'International' line as in the past, possibly with an enlarged territory.* I would not object to leaving Idaho out of the picture as far as any additional territory would be concerned." (Italics added)

This letter also states in effect, that he recognizes Mr. Turk's exclusive right to the use of the name "International" as a trade-mark when he said:

"As to the new line of fencers, I would be the one and only distributor of these types and model which might be designated from time to time. In other words, the new names in types would be my own personal property and not be sold by anyone except through me." (Rec. 183).

Mr. Hughes again fully appreciated that the trade-mark "International" for electric fences and fence controllers belonged to Mr. Turk when he said in this same letter:

"Assuming at first you not only would frown upon, but would probably decidedly object to such a venture on my part, I had tentatively decided to look into the manufacturing possibilities, or to have someone else supply my need in this respect, *with the exception of the 'International' fencers, which I would expect to continue to handle either on the same basis as at present or under a more extensive proposition as might be agreed.*" (Rec. 183). (Italics ours)

Again on July 31, 1944 (Plaintiff's exhibit 16) Mr. Hughes further appreciated that the trade-mark "International" was the exclusive property of Mr. Turk when he said:

"You can rest assured that I am not planning on dropping International fencers in Oregon and Washington" * * * as I have "a chance to expand my business, as suggested in my former letter I had to make my own plans for any possible increase in such business. There is no other way. *At that time I would have preferred confining my interest to 'International' but due to the above circumstances, it was necessary to figure out some other way or gradually fade out.*" (Rec. 190) (Italics ours)

We call the Court's attention to Plaintiff's exhibit 18 which is another letter from Mr. Hughes to Mr. Turk dated September 20, 1944 (subsequent to the date Hughes bought Turk's stock) when Mr. Hughes still appreciated that the trade-mark "International" belonged exclusively to Mr. Turk when he said:

"The point I am making is that if you have had any such move in mind I will appreciate you giving me an outline of what you would want for the business, *including all rights for the trade name, of course.*" (Rec. 199) (Italics ours)

On November 18, 1944 Appellee Hughes wrote a letter to Mr. C. J. Andel and Sons in which he stated:

"he (Turk) wanted us to disincorporate so that he could prevent us from using 'International' trade name, *that is all he has, the trade name*, there is no Company in Chicago, it is simply his trade name." (Rec. 207) (Italics ours)

It is obvious from the foregoing that the Appellee Hughes fully and completely appreciated that the trade-mark "International" was the sole and exclusive right of the Chicago office which was owned by Mr. Turk.

The foregoing is a true and complete admission by Appellee. They owned no trade-mark. They had only a sales franchise in Washington and Oregon. The Appellee's letters also admits ownership of the trade-mark in Appellant and Appellant's right to grant distributorships to the exclusion of Appellee. Does one claiming ownership of a trade-mark make such detrimental admissions not only to the true owner but to outsiders as well? (Pltfs. Ex. 20, Rec. 225.) We do not believe so. The foregoing letters speak louder and more effectively than *ex post facto* testimony designed to create a defense when a Defendant is called to ask.

Inconsistent Acts of Appellee.

Appellees filed an application for registration of the trade-mark "International" in the United States Patent Office (Rec. 148) wherein they allege exclusive proprietorship. Yet ever since 1940 Appellee Hughes was fully cognizant of the use of this trade-mark by the manufacturer International Electric Fence Company of Chicago, and admitted that the ownership of the mark resided in the Chicago Company.

In a letter Hughes wrote to a rank outsider dated March 13, 1944, he said:

"The Washington Company is limited to handling the International line in the States of Washington and Oregon." * * * In order to serve your needs "we would have to obtain permission of the main office in Chicago." (Rec. 225)

Is this an act consistent with one claiming exclusive ownership? We think not especially since Appellee on the witness stand stated that all he ever claimed was the concurrent right to use the mark "International" in the Western States, limited to that territory (Rec. 213). In his

Answer (Rec. 13, 14) *he claims exclusive right* because he owns all the stock in the Washington corporation. More inconsistencies.

Appellee has never received a Certificate of Registration from the Patent Office to date. Therefore, he owns no tangible evidence of ownership. Yet in March 1945 Appellee had labels printed (Plaintiff's Ex. 11) bearing the indicia "Reg. U. S. Pat. Off." (Rec. 142). Appellee Hughes attempted to explain he received the notice of filing of the application from his attorneys *and he misconstrued the meaning thereof* to the point where he thought the letter meant the Patent Office had accepted the trade-mark (Rec. 143). This is an extremely weak explanation for a mature man to foist upon a court. But be this as it may—Appellee Hughes says he "found out a few months afterwards it was wrong". (Rec 143) He established the date as the time he received Appellants letter Ex. 13 (Rec. 146) wherein Turk charged him with infringement of his trade-mark "International" (Rec. 145). The date of this letter is April 4, 1945. And Appellee Hughes stated he immediately stopped using the labels with this legend. Let us go one step further—Appellee Hughes *filed* for registration the trade-mark "International" in twelve (12) Western States both *before and after* he says he stopped using the labels containing this legend; for instance in Utah on *August 6, 1945*, Nevada on *October 11, 1945*, Montana on *July 24, 1945*, Wyoming on *October 18, 1945* (Rec. 133). Each of these State Certificates contained a specimen label of Appellee containing the legend "Reg. U. S. Pat. Off.". (Rec. 158).

It is contended that in view of the foregoing glowing examples of gross inconsistencies and falsifications contained in the record, the entire testimony of the witness Hughes should either be stricken or where not supported

by documentary evidence, not considered. If this were the case, since we have pointed out many such inconsistencies throughout this brief, which are the crux of Appellee's case, then Appellee would be without a defense and the decision of the lower Court ought to be reversed.

Unfair Competition.

Appellant should have been allowed to present evidence and testimony to establish its charge of unfair competition as contained in the Amended Complaint (Rec. 6) but was precluded from doing so by the lower court on the basis that if the Defendants prevailed there would be no reason for going into that phase of the case (Rec. 101). If this Court reverses the lower court as is urged herein, the Appellant should be given an opportunity to present proper evidence to establish this count.

The Public Will Become Confused If the Parties Are Allowed to Sell Side by Side and Use the Same Trade-Mark.

Trade-marks are designed, as pointed out in the forepart of this brief, to identify the source of origin of the goods to the end that the purchasing public will know who is responsible for them. The District Court's decision in this case has created an intolerable situation in that, by its decision, both the Appellant and the Appellee were given the right to use the trade-mark concurrently (side-by-side) in eleven (11) Western States, and the Appellant was given the exclusive right to use the mark in all the other States of the United States.

It should be apparent that the purchasing public will not be able to ascertain without considerable inquiry which one of the parties was the manufacturer of the goods that was purchased. The names of the two companies are

substantially identical and, of course, the mark is identical. The format of the labels of both parties are substantially the same and, we believe, the purchasing public will certainly not be able to distinguish between the two manufacturers under these circumstances.

The situation created by the decision of the lower court is absolutely inconsistent with the Trade-Mark Laws. The term "concurrent use" as defined by the new Trade-Mark Law (1946), we believe, is not inconsistent with the decisions of the Courts with reference to the old Trade Mark Law of 1905, under which this case is being tried.

Multiple Use of Same Trade Mark.

The courts, for reasons of equity, will recognize more than one owner of a trade-mark where there is simultaneous use in good faith of an identical trade-mark for the same or similar merchandise *in different parts of the country*. However, for the purposes of Federal registration, *such multiple ownership was not recognized under the 1905 Trade-Mark Law*. This suit was tried under the 1905 Trade-Mark Law and the certificate of registration involved herein was granted under this law to appellant. If under the 1905 Law there were multiple use of the same trade-mark in different sections of the country applied to the same or similar goods and if the several users applied for a Federal registration, the Patent Office would grant only one registration and that registration would be granted to the one party whose use was prior in time. So far as the Patent Office is concerned, it makes its decision on that basis alone without any consideration as to territorial limitations.

The result of this has been a strange discrepancy between a recognized right to use the mark and the inability to register such right. The situation however has been cleared up by Section 2(d) of the Act of 1946 which au-

thorizes the Commissioner of Patents to register the same or similar mark “as concurrent registrations” to more than one registrant “when they have become entitled to use such marks *as a result of their concurrent lawful use thereof prior to any of the filing dates of the applications involved.*” Under the circumstances, the Commissioner may grant both registrations if he determines *that confusion is not likely to result* from the continued use of this mark. In the present case it is impossible to avoid confusion as pointed out.

As stated in the fore part of this brief, a trade-mark has been substantially defined by the Supreme Court as a distinctive mark of authenticity through which the *producers of particular manufactures*, or the vendible commodities of particular merchandisers *may be distinguished from those of others.* *Standard Paint Co. v. Trinidad Asphalt Co.*, 220 U. S. 446; *Elgin Watch Co. v. Illinois Co.*, 179 U. S. 665.

The Court also said that the trade-mark points distinctively, either by itself or by association, *to the origin, manufacture, or ownership of the article on which it is stamped.* *Columbia Mill Co. v. Alcorn*, 150 U. S. 460.

The Public will be confused if the Parties sell side-by-side in the same Territory.

It is apparent that two corporations, not associated with each other, cannot possibly sell identical articles having the identical trade-marks in identical territories without creating confusion in the minds of the purchasing public. The merchandise is sold through the same channels in trade and to the same class of buyers. Under the Trade-Mark Law of 1905, the situation created by the decision of the lower court, in the present case, completely upsets the law of trade-marks as it has been known since the en-

actment of the trade-mark law and interpreted by the Supreme Court of the United States.

If the products of the parties were not identical or the marks were not confusingly similar, then the lower court's decision could be appreciated. But in the present case, the products of the parties herein are identical to such an extent that the parts are even interchangeable (Rec. 376); the trade-marks of the parties are identical in every detail, even being written in the same manner on the labels. Therefore, a situation has been created by the lower court's decision which is intolerable from the purchasing public's point of view, in view of the fact that the public would not be able to ascertain, without a great deal of difficulty, the source of origin of the product which it buys.

CONCLUSION.

In conclusion, it is respectfully submitted that the decision of the lower court should be reversed as to paragraphs 1 and 3 of the final Decree of February 18, 1949, and appearing at Rec. page 23. And there should be a further order entered in this cause requiring the lower court to grant appellant the right to establish its case relative to the unfair competition phase thereof, set forth in paragraph 11 of the Amended Complaint, as appears on page 6 of the Record. The relief prayed for in the Amended Complaint should be granted.

Respectfully submitted,

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December 23, 1949.

No. 12270

IN THE
United States Court
of Appeals
FOR THE NINTH CIRCUIT

INTERNATIONAL ELECTRIC COM-
PANY, an Illinois corporation,
Appellant,

vs.

INTERNATIONAL ELECTRIC FENCE
Co., a Washington corporation;
and GEORGE N. HUGHES,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON
SOUTHERN DIVISION

Brief of Appellees

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Appellees.

RESTATEMENT OF THE CASE

The basic and controlling issues of fact in this case were found against Appellant by the Trial Court. For this reason, and because the statement of the case in Appellant's brief is not entirely clear and complete, a restatement is considered necessary.

In this brief Appellant will be referred to as the Illinois corporation and the Appellee corporation as the Washington corporation. It was the position of the Illinois corporation that it had the exclusive right to use the trade-mark "International" on electric fencers

and allied products throughout the United States. (R. 27.) The Washington corporation did not maintain that it had an exclusive right to use such trade-mark, but did claim the right to concurrent use in certain western states, basing such upon the same prior use upon which the Illinois corporation relied. (R. 214, 215.) The Trial Court found and held in accordance with the contention of the Washington corporation. (R. 15-23.)

In 1938 R. H. Turk and Vernard Soper formed an Oregon corporation under the corporate name of International Electric Fence Company, Inc., to engage in distribution and selling of electric fencers and used thereon the trade-mark "International." (R. 62, 351, 352, 442.) The Oregon corporation was unsuccessful financially and was abandoned the same year. (R. 63, 353, 479, 480.) In the spring of 1938, Soper went to Chicago where he started a business of assembling and distributing electric fencers. This was carried on by him as an individual under the assumed name of International Electric Fence Company and the product carried the trade-mark "International." (R. 447, 448.) In the fall of 1938, Turk commenced doing business in Vancouver, Washington, as an individual under the identical assumed name, International Electric Fence Company. (R. 63, 106, 477.) In 1938 while Turk was doing business in Vancouver he used the trade-mark "International" on the fencers distributed and sold by him which were assembled for him by one Good. (R.

64, 106, 334, 392.) In later years Turk bought his products from Soper who assembled them in Chicago. (R. 67.)

In 1941 Turk needed capital and by arrangement with his bookkeeper, Appellee G. N. Hughes, the latter paid Turk \$2,000.00 for a one-half interest in the business, an amount equal to one-half of its then net worth. (R. 163, 164.) This sale of an interest in the business included its good will. (R. 320.) Within a few weeks thereafter the equal partnership so created was incorporated under the laws of the State of Washington under the corporate name of International Electric Fence Company, Inc., and Hughes and Turk each took one-half of the stock in the new corporation. (R. 66.) Both Turk and Hughes testified that they had no conversations specifically referring to the trade-mark "International" prior to the incorporation, or later when Hughes bought Turk's stock in the Washington corporation, although the trade-mark was used continuously. (R. 121, 177, 341, 343, 348, 349, 388, 390, 391.) Turk admitted Hughes stated that he wanted the trade-mark in a letter prior to July 1, 1944, when Hughes bought Turk out. (R. 405, 406.) The minutes of the first meeting of the Directors of the Washington corporation provide in part as follows:

"R. H. Turk and G. N. Hughes had heretofore owned certain assets as co-partners, and were doing business in Vancouver as an electric fence company, and had built up a business and created good will. The said assets consist of machinery, equipment, good will, accounts receivable, etc. Said G. N.

Hughes and wife and R. H. Turk and wife then offered to convey to the corporation all of the assets of said co-partnership in full payment of the capital stock subscribed by R. H. Turk and wife and G. N. Hughes and wife. It was thereupon duly moved, seconded and carried that the best interests of the company would be furthered by accepting the offer; that the reasonable value of the said assets was \$4,000.00, and the officers of the corporation were thereupon instructed and authorized to issue to the stockholders common stock in payment of said assets, and that their stock subscriptions were considered paid in full." (R. 394, 401.)

These minutes were signed by R. H. Turk, President, and G. N. Hughes, Secretary. (R. 402.) They conveyed to the Washington corporation all assets of the co-partnership, including specifically good will of which the trade-mark "International" was an inseparable part.

In June, 1943, Turk left Vancouver, while still President of the Washington corporation, and went to Chicago to expedite production of fencer units which were scarce due to wartime material shortages. (R. 68.) In Chicago, Turk became a partner of Soper in the then unincorporated International Electric Fence Company of Chicago and thereafter competed with the Washington corporation of which he was President, using the same product and same trade-mark. (R. 68, 88, 124, 310, 414, 415, 451, 452.)

On June 1, 1944, the partnership between Turk and Soper, doing business as the International Electric Fence Company in Chicago, had been dissolved and

Turk became the sole owner of that business which evolved into the present Appellant Illinois corporation which is controlled and almost wholly owned by Turk. (R. 71, 73.) Both Turk's Illinois corporation and Hughes' Washington corporation sought to register the trade-mark "International" as applied to fencer units. Hughes filed his application before Turk's filing but gave as date of first use January 2, 1938, while Turk specified January 1, 1938, as such date. (R. 93, 135, 136, 137, 148.) There is no dispute, however, that both claim prior use from the same source. (R. 138.) Turk's application was granted; that of Hughes is still pending, although it was at first rejected on the ground that National Battery Company had a prior appropriation of "International." However, when attention was called to Turk's registration it was published and is pending. (R. 151-156.)

By July 1, 1944, relations between Hughes and Turk had deteriorated and at that time Hughes bought all of Turk's stock for approximately one-half of the then net worth of the Washington corporation and further paid, or arranged to pay, all salary and commissions owing to Turk. (R. 83, 114, 165, 341, 342.) Hughes then considered the trade-mark part of the assets of the Washington corporation. (R. 179.) Appellant's theory of the case was based on Turk's testimony that after he stopped selling fencers produced by Good in 1939 and started to buy fencers produced by Soper, then doing business as the International Electric Fence Company in Chicago, he agreed that Soper should have

the exclusive right to manufacture units carrying the trade-mark "International" while he, Turk, should have exclusive distribution thereof in the western states. (R. 235.) He further claimed and testified that subsequently he received back the exclusive right to use the trade-mark "International" as applied to fencers from Soper on dissolution of their partnership, although the written agreement of that dissolution does not mention it. (R. 428.) The trade-mark was not mentioned when Turk became Soper's partner. (R. 355.) Turk admitted he placed no value on the trade-mark until 1944. (R. 354.) With respect to his testimony attention is invited to the comment of the Trial Judge who saw and heard the witnesses:

"In Mr. Turk's statements there are many inconsistencies; statements that are inconsistent with the actions of a person who is willing to tell the whole truth about a transaction. So, in the very material features of this case, where there is a conflict between the testimony of these two men, I find the testimony of Mr. Hughes is more reliable." (R. 526.)

Soper testified by deposition at the instance of the Illinois corporation and apparently was a disinterested witness. He testified that he had never had the exclusive use of the trade-mark "International"; that he did not have any binding agreement with Turk as to its use; and that it was his understanding that either he or Turk could use it as they wished in the manufacture, assembly, distribution and sale of electric fencers. The testimony of this witness is in direct conflict with that

of Turk, who was the other party to the alleged transaction regarding the exclusive right to use such trade-mark.

ARGUMENT

I. THE SINGLE CONTROLLING ISSUE WAS DECIDED FOR APPELLEE ON THE FACTS

This action was decided as an issue of fact by an able Trial Judge who saw and heard the witnesses. Appellant Illinois corporation introduced evidence of its registration of the claimed trade-mark "International" and rested, and thereupon Appellee went forward with evidence establishing its right to concurrent use.

Nims, *Unfair Competition and Trade-Marks*, Fourth Edition, pages 732 to 734, Sec. 223a, states the controlling principles of law pertaining to trade-mark registration as follows:

“Registration under the statutes confers no new rights to the mark claimed or any greater rights than already exist at the common law without registration.”

“Common law rights as to trade-marks were unaffected by the Act of 1905 which expressly states: ‘Nothing in this act shall prevent, lessen, impeach or avoid any remedy at law or in equity, which any party, aggrieved by any wrongful use of any trade-mark might have had, if the provisions of this chapter had not been enacted. There is a similar provision in the 1946 act.’ ”

.

“Registration does not in any way conclude any property rights in a mark. All parties interested are free after registration as before, to maintain whatever rights they may have in law or in equity.”

“... No right of property is concluded by registration of a mark, and the parties affected are free to seek relief as courts of law or equity may award.

.

“A registration is *prima facie* evidence of use of the mark by the registrant up to the time of its assignment by it.”

It was Illinois corporation's contention that Turk had conveyed the trade-mark “International” to Soper, doing business as the International Electric Fence Company of Chicago, about 1939 or 1940 and that such trade-mark was reconveyed to Turk and hence to the Illinois corporation in 1944; that, therefore, Turk never had the trade-mark to convey to the Washington corporation at the time of its formation in 1941. (R. 349, 353.) Appellee Washington corporation took the position, which was sustained by the Trial Court, that Turk had the right to use the trade-mark, “International” as applied to electric fencers for all purposes in 1941 and conveyed the same to the Washington corporation. (R. 137, 142, 429.)

Neither the minutes of the first meeting of the Washington corporation, nor the agreement for the dissolution of the partnership of Turk and Soper, contains any specific reference to the trade-mark. (R. 354, 399.) Hence, the contention of *both* parties rests upon the theory that the trade-mark was conveyed by impli-

cation with transfer of all assets and good will. Because of its very nature the trade-mark of a business necessarily passes with the good will of such business. Nims, *Unfair Competition and Trade-Marks*, Fourth Edition, page 520, Sec. 188, states as follows :

“A trade-mark is auxiliary to the good will of its user. It is inseparable from good will. There is no such thing as a trade-mark in gross. Disassociated from merchandise it lacks the characteristics which alone give it value; associated with merchandise other than that of the one whose good will it represents, it becomes a deceitful designation. The trade-mark is the expression, the symbol, of part or all of the good will of the business using it. Separate from the good will of the business it identifies, it is useless, valueless as a trade-mark.

“ ‘A trade-mark right cannot exist independently of some business in which it is used. The sole function of a trade-mark being to indicate the origin or ownership of the goods, it cannot exist apart from the business to which its use is incident. There is no such right known to the law as an exclusive ownership in a trade-mark apart from the right to use it in a business. It cannot exist as a right in gross.’

“If this fundamental fact is kept in mind, it is much easier to understand such basic principles of trade-marks as that a trade-mark may be acquired only by actual use, that it may be transferred only in connection with the good will of the business in which it has been used, that rights in it may be limited by the nature of the goods on which it has been used and by the geographical territory in which those goods have been sold or in which it has become known; that such rights may be lost if the mark is separated from the good will of the business.”

At very most, from Appellant's viewpoint, there was a conflict in the evidence as to whether Turk had the right to use the trade-mark for all purposes in 1941. If he did have it in 1941, then it passed to the Washington corporation. Turk testified that he did not have it at that time having given it to Soper. Soper, a disinterested witness, testified he never had the exclusive use of the trade-mark and had always considered that both he or Turk were free to use it as, when and where either of them chose at any time. The Trial Court further found Turk's testimony inconsistent with the circumstances and in fact untruthful. It is too axiomatic to require extensive citation of authority that the credibility of witnesses is peculiarly for the District Court's determination and that the findings of the Trial Court will be given great weight and will not be reversed unless clearly wrong.

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to adjudicate the credibility of witnesses.” Rule 52, Federal Rules of Civil Procedure.

There is not only substantial evidence, but an overwhelming preponderance, to support the conclusions of the Trial Court.

II. TRADE-MARK vs. TRADE-NAME

In Appellant's opening brief, reference is made to the distinction between trade-names and trade-marks. It is true that at the trial counsel, court and witnesses

sometimes referred to the trade-mark "International" as a trade-name, but it is clear from the context and the record as a whole there was no confusion that the issue concerned this trade-mark and not a trade-name. (R. 177, 323-326.)

III. "INTERNATIONAL" IS IN THE PUBLIC DOMAIN AND CANNOT BE EXCLUSIVELY APPROPRIATED

The Washington corporation claims no exclusive right to use such trade-mark. It does claim the right to concurrent use of the same in specified western states. The Illinois corporation claims the exclusive right to use the trade-mark throughout the United States. In this connection it should be noted that actually no one can appropriate for exclusive use the word "International," because it is a generic term with geographical connotations which belong in the public domain.

Nims, *Unfair Competition and Trade-Marks*, Fourth Edition, Page 290, Sec. 98a, provides in part as follows:

"... No one can obtain such an exclusive right to the use of a geographical name as to prevent others who inhabit the same geographical district or who deal in similar articles coming from that district from truthfully using the same designation. The same rule applies to maps, used as trade-marks."

Nims, at Page 327, Sec. 115, states as follows:

"The nicknames of places, and words which are not the names of places at all, though they describe location, are governed by the same rules as geo-

graphical names. 'Continental'; 'International'; 'Sea'; 'Quaker State'; have been held to be geographical names."

In *Koehler et al v. Sanders, et al*, 122 N. Y. 65, 4 LRA 576, 25 NE 235, (1890), it was held as follows:

"The word 'International' is a generic term, pertaining to relation between nations, and when applied to business or to transactions of private character it imports dealings of some sort in matters or with people of different nations, or which have some relation to them. It is in common use, and in its nature it is descriptive, and ordinarily characterizes the business to which it pertains, rather than its origin or proprietorship; and, so treated, the use of it cannot be exclusively appropriated by any party. This partnership name taken by the plaintiffs is apparently descriptive of a banking business, and indicates that it is in some sense international, and presumptively the name denotes the nature of the business. In that view, it cannot have the character essential to a trade-mark or to its exclusive use analogously to it. *Taylor v. Gillies*, 59 N.Y. 331; *Baking Powder Co. v. Sherrell*, 93 N.Y. 331; *Manufacturing Co. v. Trainer*, 101 U.S. 51; *Choynski v. Cohen*, 39 Cal. 501; *Burke v. Cassin*, 45 Cal. 467. The well-known use of this word, as commonly used in its application to business, is such as to render it *publici juris*; but it is urged that the business of the parties is not banking, and, although this term taken by the plaintiffs into their partnership name is generic, and descriptively applicable to a class or classes of business, it may in its use by them be deemed arbitrary; and therefore, as against any person engaged in a similar enterprise to that in which they are employed, the plaintiffs are entitled to the protection of its exclusive use. And in support of this proposition reference is made to the fact found by the referee that the name

‘International Banking Company’ was never used by any other person or corporation in connection with business similar to that in which the plaintiffs were engaged. That may be so, yet the word ‘international’ is not arbitrary or fanciful in its application to banking, but is descriptive of the character suggested by it of that business, and it may be deemed to have been intended to have such effect.”

In *National Grocery Co. v. National Stores Corp.* (N. J. 1924), 123 At. 740, an action to enjoin defendant from the use of the word “National” in connection with its grocery stores or corporate name, the court held the term “National” was a generic term, incapable of infringement.

In *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 37 L. Ed. 1144, it was held in part as follows:

“Second. The word ‘Columbia’ is not the subject of exclusive appropriation under the general rule that the word or words, in common use as designating locality, or section of a country, cannot be appropriated by any one as his exclusive trademark.

.

“In *Koehler v. Sanders*, 9 L.R.A. 576, 122 N.Y. 65, it was held that the word ‘international’ could not be exclusively appropriated by any one as a part of a trade-name, because the word was a generic term in common use, and in its nature descriptive of a business to which it pertains, rather than to the origin or proprietorship of the article to which it might be attached.”

In *Continental Ins. Co. v. Continental Fire Ass'n.*, 96 Fed. 846, it was held as follows:

“The word ‘continental’ is a generic term, and it is not the policy of the law to permit the exclusive appropriation of words or terms which are generic; that is, which pertain to a class of related things, and which are of general application. The right to use such words should remain vested in the public. See *Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, and cases there cited; also *Koehler v. Sanders*, 122 N.Y. 65, 25 N.E. 235; *Goodyear’s India-Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U.S. 598, 9 Sup. Ct. 166.”

IV. APPELLANT HAS NO STANDING ON EQUITY

Appellant is not entitled to a reversal on either fact or law, nor as a matter of equity. Turk, who owns and controls the Illinois corporation, has demonstrated his bad faith, breached his fiduciary duty and comes here with unclean hands. After going to Chicago, and while President of the Washington corporation, Turk competed with the Washington corporation in the sale and distribution of identical products using the identical trade-mark and a substantially identical trade-name. This was a breach of his fiduciary duty as President of the Washington corporation and brings him within the ancient maxim: “He who seeks equity must do equity.”

CONCLUSION

It is respectfully submitted that the Illinois corporation does not have the right to exclusive use of the trade-mark "International" either on the facts or on the law and that its position is not grounded in equity. That, Therefore, the judgment of the Trial Court should be affirmed in all respects.

Respectfully submitted,

GEORGE H. BOLDT,
METZGER, BLAIR, GARDNER & BOLDT,
Attorneys for Appellee.

Office and P. O. Address:
523 Tacoma Building
Tacoma 2, Washington.

12271

United States
Court of Appeals

For the Ninth Circuit.

LEWIS FRED PENWELL and SUSANNAH W.
PENWELL, Executor and Executrix of the
Estate of Lewis Penwell, formerly Collector of
Internal Revenue for the District of Montana,
deceased,

Appellants,

VS.

JOHN N. NEWLAND, JAMES TULLIS,
GEORGE I. MARTIN, and BUTTE EXECU-
TIVES CLUB, a non-profit unincorporated
association,

Appellees.

Transcript of Record

Upon Appeal from the United States District Court
for the District of Montana.

FILED
AUG - 5 1949

12271

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Billings, Montana.

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Assistant United States Attorney,
Great Falls, Montana.
Attorneys for Appellants and
Defendants.

MR. T. J. DAVIS,
Butte, Montana, and

MR. L. C. MYERS,
Butte, Montana.
Attorneys for Appellees and Plaintiffs.

In the District Court of the United States for the
District of Montana, Butte Division

Civil No. 350

JOHN N. NEWLAND, JAMES TULLIS,
GEORGE I. MARTIN, and BUTTE EXECU-
TIVES CLUB, a Non-Profit Unincorporated
Association,

Plaintiffs,

vs.

LEWIS PENWELL, Individually and as COL-
LECTOR OF INTERNAL REVENUE FOR
THE DISTRICT OF MONTANA,

Defendant.

COMPLAINT

Come now the plaintiffs above named, and for
their cause of action against the defendant, com-
plains and alleges:

I.

Plaintiff, Butte Executives Club, is a non-profit
unincorporated associated with its business ad-
dress at First National Bank Building, Butte,
Montana.

II.

That the plaintiffs above named, prior to the
times herein mentioned, associated themselves with
one hundred ninety other persons for the purpose
of the education of themselves and of the other mem-

bers of the plaintiff, Butte Executives Club, and that said association of members is known and described as the Butte Executives Club; that the question herein involved is one of common and general interest to all of the members of the said association, and that it is impracticable to bring all of said plaintiffs and members of the association who are interested in the question involved herein before the Court; and that this action is brought not only for the benefit of the above-named plaintiffs, but also for the benefit of all other members of the aforementioned association, who have a common interest in enforcing liability under the allegations of this complaint. [3*]

III.

That during the years 1944, 1945, and 1946, the following named persons were duly elected, qualified, and acting members of said Butte Executives Club, to wit: John N. Newland, James Tullis, and George I. Martin.

IV.

That Lewis Penwell, defendant herein, now is and ever since July 6, 1933, has been Collector of Internal Revenue for the District of Montana, residing within the Judicial District of the State of Montana and within the jurisdiction of this Court.

V.

This Court has jurisdiction of the cause of action stated in this complaint in that said cause of action

arises under the laws of the United States, to wit: Internal Revenue Code (Act of February 10, 1939, c. 2, 53 Stat. (Part I), Pub. No. 1, 76th Cong., 1st Sess.-H. R. 2762), as amended. And this Court has jurisdiction under the provisions of Sec. 41(5) Title 28, U.S.C.A.

VI.

This action is brought to recover a sum illegally collected as Federal admission taxes and withheld from plaintiffs, by defendant, as hereinafter set forth, together with interest thereon as provided by law.

VII.

The purpose of plaintiff, Butte Executives Club, is the education of its members through informal talks. Each person admitted to membership must pay to plaintiff, Butte Executives Club, a \$10.00 initiation fee and annual dues of \$10.00, payable in advance. During the month of September, 1945, plaintiff, Butte Executives Club, collected an aggregate amount of \$1,910.00, being \$10.00 from each of twenty-eight new members for initiation fees, and \$10.00 from each of one hundred sixty-three members for annual dues. Neither said initiation fees nor said dues, nor any part thereof, were paid as or for admission to any place. The Commissioner of Internal Revenue erroneously treated the said collections as payments "for admission to any place"; and the defendant, on October 28, 1945, illegally collected from plaintiff, Butte Executives

Club, in respect of said collections, the sum of Three Hundred Eighty-two Dollars (\$382.00) as admission [4] taxes under section 1700 of the Internal Revenue Code, as amended. Said sum of Three Hundred Eighty-two dollars (\$382.00) was involuntarily paid by plaintiff, Butte Executives Club, to defendant.

VIII.

That the levying and collecting of the amount herein set forth as taxes by the Commissioner of Internal Revenue, upon the payments referred to herein, was erroneous, invalid, and unlawful under the laws and statutes of the United States and the facts hereinbefore set forth and said plaintiffs were and are entitled to the allowance of said claim and demand, a copy of which claim and demand is marked Exhibit "A," hereto attached, and made a part of this complaint, and a return of the moneys paid upon said payments as aforesaid.

IX.

That on or about December 3, 1945, plaintiff, Butte Executives Club, filed with the Collector of Internal Revenue for the District of Montana a claim and demand for refund for the sum of Three Hundred Eighty-two Dollars (\$382.00), which claim and demand for refund was rejected by the Commissioner of Internal Revenue in a letter mailed by the Commissioner to plaintiff by registered mail on February 26, 1946; that a copy of said claim

and demand is hereto attached, marked "Exhibit A," and specifically referred to as a part of this complaint. Neither the said sum of Three Hundred Eighty-two Dollars (\$382.00) nor any part thereof has been paid, credited, or refunded to plaintiffs.

Wherefore, Plaintiffs pray that they be permitted to maintain this action for and on behalf of all of the members of the Butte Executives Club, the association herein mentioned and a party plaintiff who will unite with plaintiffs in the suit, and that an order of this Court to that effect and for such purpose be forthwith made; and plaintiffs further pray that judgment be entered for the plaintiff, Butte Executives Club, and against the defendant in the amount of Three Hundred Eighty-two and No/100 Dollars (\$382.00), or such other amount as the Court may determine, [5] together with interest thereon as provided by law, and for the costs and disbursements of this action.

T. J. DAVIS,

Attorney for Plaintiffs.

District and State of Montana,
County of Silver Bow—ss.

James Tullis, being first duly sworn, on his oath deposes and says: That he is one of the plaintiffs named in the above-entitled action; that he has read the above and foregoing Complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to those things therein

stated on information and belief, and as to those things he believes them to be true.

JAMES TULLIS.

Subscribed and sworn to before me this 31st day of December, A.D. 1946.

[Seal]

G. V. BREW,

Notary Public for the State of Montana, Residing at Butte, Montana.

My Commission expires Oct. 8, 1949.

Personal service of summons and complaint on the United States Attorney for Montana is hereby admitted this January 28, 1947.

JOHN B. TANSIL,

U. S. District Attorney for
Montana.

HARLOW PEASE,

Assistant U. S. Attorney. [6]

Filed: December 31, 1946

EXHIBIT "A"

Form 843

Treasury Department
Internal Revenue Service
(Revised July, 1947)

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below

the kind of claim filed, and fill in the certificate on the reverse.

- ☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes.)

State of Montana,

County of Silver Bow—ss.

Name of taxpayer or purchaser of stamps,
Butte Executives Club.

Business address,

First National Bank Building, Butte, Montana.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Montana.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Sept. 1, 1945, to Oct. 1, 1945.

3. Character of assessment or tax, Admission.

4. Amount of assessment, \$382.00; dates of payment, October 29, 1945.

6. Amount to be refunded, \$382.00.

8. The time within which this claim may be le-

gally filed expires, under sections 3313 & 3370 of the Internal Revenue Code on October 29, 1949.

The deponent verily believes that this claim should be allowed for the following reasons:

Butte Executives Club is a non-profit unincorporated organization for education of its members through informational talks. Each person admitted to membership must pay to the Club a \$10 initiation fee and annual dues of \$10 payable in Advance. During the month of September, 1945, the Club collected initiation fees and annual dues from its members aggregating \$1,910. The Commissioner has erroneously treated the said collections as payments for admission to any place; and the Collector of Internal Revenue for the District of Montana, on October 29, 1945, illegally collected from the Club, in respect of the said collections, the sum of \$382. as admission taxes under sec. 1700 of the Internal Revenue Code, as amended.

/s/ BUTTE EXECUTIVES CLUB.

By E. R. BLINN.

Subscribed and sworn to before me this 5th day of December, 1945.

[Seal] JOE ZUPIN,

Notary Public for the State of Montana, Residing
at Butte, Montana.

My commission expires Nov. 4, 1946. [7]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above-entitled action and for answer to the plaintiff's complaint, admits, denies and alleges:

I.

The defendant admits the allegations of paragraph one of the complaint.

II.

The defendant admits that the plaintiffs Newland, Tullis and Martin, were associated with one hundred ninety other persons for the stated purpose of the education of themselves and of the other members of the plaintiff, Butte Executive Club, and that the said association of members is known as the Butte Executive Club. The defendant is without information and knowledge sufficient to form a belief as to the truth of the remaining allegations contained in paragraph two.

III.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph three of the complaint.

IV.

Answering paragraph four, defendant admits that Lewis Penwell was the Collector of Internal Reve-

nue for the District of Montana at the time of the filing of said complaint, and alleges that Thomas M. Robinson now is, and ever since July 1, 1947, has [9] been the Collector of Internal Revenue for the District of Montana, residing within the Judicial District of the State of Montana, and within the jurisdiction of this Court.

V.

The defendant denies the allegations contained in paragraph five of the complaint.

VI.

Answering paragraph six of the complaint, the defendant admits that this action is brought to recover a sum collected as Federal admission taxes withheld from plaintiff together with interest thereon. The defendant denies the allegations or the implication of the allegation that the taxes were illegally collected and illegally withheld from the plaintiff by the defendant.

VII.

Answering paragraph seven of the complaint, the defendant admits that the stated purpose of plaintiff, Butte Executive Club, is the education of its members through informal talks, and that each person admitted to membership must pay to plaintiff, Butte Executive Club, \$10.00, denominated an initiation fee and what is stated to be annual dues of \$10.00, payable in advance. Defendant further admits that during the month of September, 1945,

plaintiff, Butte Executive Club, collected an aggregate amount of \$1,910.00, being \$10.00 from each of twenty-eight new members for what was denominated initiation fees, and \$10.00 from each of one hundred and sixty-three members for what was stated to be annual dues, and it is further admitted that the Commissioner of Internal Revenue treated the said collections as payments "for admission to any place"; and that the defendant collected from plaintiff, Butte Executive Club, in respect of such collections the sum of Three Hundred Eighty-two Dollars (\$382.00) as admission taxes under section 1700 of the Internal Revenue Code as amended. The defendant denies the remaining allegations of this paragraph of the complaint.

VIII.

The defendant denies the allegations set forth and contained [10] in paragraph eight of the complaint save and except it is admitted that Exhibit "A" is a copy of the claim for refund filed with the Commissioner of Internal Revenue.

IX.

The defendant denies the allegations set forth and contained in paragraph nine of the complaint save and except that it is admitted that Exhibit "A" is a copy of the claim for refund filed with the Commissioner of Internal Revenue, and it is further admitted that said claim was rejected by the Commissioner on February 26, 1946, and it is further ad-

mitted that no part of the said sum of \$382.00 has been paid, credited or refunded.

For a further and second defense to the action set forth in plaintiff's complaint, the defendant admits, denies and alleges:

I.

This court has no jurisdiction of the action on the ground and for the reasons:

(1) The said plaintiffs, Newland, Tullis and Martin, have not, as individuals filed any claims for refund of tax with the Commissioner of Internal Revenue as required by Section 3772 (a) of the Internal Revenue Code.

(2) If the suit is sought to be maintained by the Butte Executives Club, a non-profit unincorporated association, as agent for its members, then it has failed to comply with Section 101.42 of Treasury Regulations 43, which required the claimant to submit with the claim for refund the following information:

(a) An alphabetical list of the names of the taxpayers, showing the amount claimed in behalf of each, and the dates on which the amounts were paid to the Collector of Internal Revenue.

(b) A power of attorney executed by each person in whose behalf the claim is filed authorizing the organization to act as his agent. The power of attorney must be prepared on the usual form of such instruments; must be acknowledged before a notary public or signed in the presence of two wit-

nesses and must include a statement that any revocation will not be effective until the Commissioner receives notification. [11]

(c) A copy of the constitution or by-laws or other rules and regulations of the organization, together with a copy of each amendment thereto.

Wherefore, the defendant prays that the plaintiff take nothing by his complaint, and that the same be dismissed with costs assessed against the plaintiff.

JOHN B. TANSIL,
United States Attorney, in and for the District of
Montana.

HARLOW PEASE,
Assistant United States Attorney in and for the
District of Montana.

EMMETT C. ANGLAND,
Assistant United States Attorney in and for the
District of Montana.

Filed August 20, 1947. [12]

[Title of District Court and Cause.]

AGREED STATEMENT OF FACTS

Come now the parties above named through their respective counsel and submit the above cause for decision by the Court upon the agreed facts hereinafter set forth, each of said parties hereby ad-

mitting for the purpose of this case only that said facts are true and correct, and each of said parties hereby moving for summary judgment in its or his favor upon the facts so agreed upon and admitted, to wit:

I.

The plaintiff, Butte Executives Club, is a non-profit unincorporated association organized in July of 1944, with its business address at First National Bank Building, Butte, Montana.

II.

The action arises under the provisions of Section 1700(a) of the Internal Revenue Code of the United States (Title 26 USC, Section 1700) and the Court has jurisdiction under the provisions of Section 41(5), Title 28, USC.

III.

At all times mentioned in plaintiffs' complaint, the defendant, Lewis Penwell, was Collector of Internal Revenue for the District of Montana. [14]

IV.

That John N. Newland, James Tullis and George I. Martin, plaintiffs named in the complaint, were associated with one hundred ninety other persons as members of the plaintiff, Butte Executives Club.

V.

That the by-laws of plaintiff, Butte Executives Club, are as set forth in Exhibit "A" hereto attached and made a part hereof.

VI.

That the affiliation agreement referred to in Article VI of the by-laws of the plaintiff, Butte Executives Club, is hereto attached as Exhibit "B" and made a part hereof.

VII.

The Associated Executives Clubs, Incorporated, is chartered under the laws of the State of Delaware and has for its purpose the production of education and entertainment talent through its activities as a booking agency, and the promotion and organization of local Executives Clubs in cities throughout the United States, as an outlet for such talent booked by them; and it derives its money from an initiation fee of \$10.00 and membership fee of \$10.00 collected for first year by the local Executive Club from each member, as agent, and remitted, except for \$1.00 per member until the end of first fiscal year on last day of June, 1945, by the local club to the Associated Executives Clubs, Incorporated, after which time all dues and initiation fees are used by local clubs to pay speakers and for necessary local expense. After first year all speakers are secured through the Associated Executives Clubs, Incorporated, for which Butte Executives Club makes remittance to the Associated Executive Clubs, Incorporated, in accordance with the particular agreement embracing the particular speaker, as is more fully set forth in Exhibit "B" hereto attached. The period for which the tax was collected

from Butte [15] Executives Club was the second year, viz. July 1, 1945, to July 1, 1946.

VIII.

Admission to lectures for the education and entertainment of members of the Butte Executives Club is by membership card only. Admission is restricted to members and qualified guests, as provided in the by-laws of the plaintiff club, and in particular Article 5 of Exhibit "A" hereto attached and made a part hereof; the only benefit derived by the members and the only thing of value received in return for a \$10.00 initiation fee and annual dues of \$10.00, payable in advance by each person admitted to membership to the Butte Executives Club, is the privilege of attending the lectures scheduled by the Butte Executives Club and the privilege of taking guests as defined in Article 5 and guests as determined by the Board of Directors as provided for in said Article 5.

IX.

The stated purpose of plaintiff, Butte Executives Club, is as stated in Exhibits "A" and "B" hereto attached and made a part hereof; that during the month of September, 1945, plaintiff, Butte Executives Club, collected an aggregate amount of \$1910.00, being \$10.00 from each of twenty-eight new members for what was denominated initiation fees, and from each of one hundred sixty-three members for what was stated to be annual dues, said sum representing total amount due from members

for the year from July 1, 1945, to July 1, 1946, and that no other money was collected from the members either as taxes or otherwise; and the Commissioner of Internal Revenue treated the said collections as payments "for admission to any place" and collected from plaintiff, Butte Executives Club, on the 28th day of October, 1945, the sum of \$382.00 as admission taxes under Section 1700 of the Internal Revenue Code, as amended (Title 26 USC); that no taxes were exacted from Butte Executives Club for collections made from members for the period beginning July 1, 1944, and ending June 30, 1945. [16]

X.

That Exhibit "A" attached to the complaint is a copy of the claim for refund filed with the Commissioner of Internal Revenue, and that said claim was rejected.

XI.

The sum of \$382.00 collected by the Commissioner of Internal Revenue, hereinbefore referred to, was paid out of the treasury of the Butte Executives Club.

XII.

The sole question to be determined herein is whether the assessment and collection of said tax was valid and lawful under the laws and statutes of the United States and facts herein set forth, and whether said plaintiffs were and are entitled to the allowance of said claim for refund and a return

of the tax paid in the amount of \$382.00, with interest.

T. J. DAVIS,

L. C. MYERS,

Attorneys for Plaintiffs.

JOHN B. TANSIL,

U. S. Attorney.

HARLOW PEASE,

Assistant U. S. Attorney.

EMMETT C. ANGLAND,

Assistant U. S. Attorney,

Attorneys for Defendant.

EXHIBIT "A"

By-Laws

Butte, Montana, 7/21/44.

Article I

Name

Section 1: This organization shall be known as the Butte Executives Club.

Article II

Purpose

Section 1: The purpose and objects of this organization shall be, for education of its members through informational talks. It shall be a non-profit organization.

Section 2: This Club, as an organization, shall not in any way participate in the political candidacy

of any person, nor shall the machinery of the Club be used in any way for political purposes.

Article III.

Membership

Section 1: Only persons of good moral character shall be eligible to membership in this Club. The membership shall be limited to 200 members, provided, however, this number may be changed by the Board of Directors.

Section 2: Any member may resign from this Club, and such resignation shall be immediately effective upon its delivery to the Board of Directors, providing all indebtedness of such person has been paid, including his dues for the year in which such resignation becomes effective. Expulsion of a member shall be the only remedy for non-payment of dues.

Section 3: Membership applications shall be received by the Board of Directors, its Executive Committee, if one is named, or Membership Committee, if such is determined, and they shall approve such applications.

Article IV.

Officers

Section 1: The business and affairs of this Club shall be managed by a Board of 12 Directors, who shall be elected at, or prior to, the first meeting of the Club, Four Directors for 1 year, Four for 2 years, and Four for 3 year terms, and at each election thereafter four Directors shall be elected for

3 years each. First Directors to be determined by lot, or other suitable means, as regards terms of office. The Board of Directors shall elect a President, one or more Vice-Presidents from their own number, and a Secretary-Treasurer, who may be, but need not be, a member of the Board of Directors, but who shall act as "ex-officio" member of the Board. The President and Board of Directors shall appoint from time-to-time such Committees as they deem necessary. The fiscal year ending on the last day of June, it is herewith provided that election of Four Directors for each fiscal year be held prior to the close of the fiscal year, the election of Directors being by ballot of the membership, notice of which shall be furnished the membership in advance, and determination of nominations resting with the Directors. The officers each year being elected as above provided, namely, President, etc. Officers and Directors, excepting the office of Secretary-Treasurer, shall not succeed themselves, but a lapse of one year shall be had. The Secretary-Treasurer may continue in office if so re-elected by the Directors.

Section 2: The election of Directors each year shall be announced 10 days prior to the election to the membership. Any vacancies on the Board of Directors shall be filled by the Directors at such a meeting as may be designated and determined for the purpose.

Section 3: A majority of the Directors present, or its Executive Committee, if such is determined,

following notification of such meeting to all members of the Board of Directors, by the Secretary, in reasonable time, shall constitute a quorum for the conduct of such business as may come before the meeting. [19]

Section 4. The Board of Directors and Officers of the Club elected at the first meeting or otherwise, shall hold office until the next annual meeting and until their successors have been duly elected and qualified.

Article V.

Meetings

Section 1: The Board of Directors shall arrange for the dinners and meetings of the Club each year, at such time, place, and cost providing such speaking in their judgment shall best carry out the purpose of this organization.

Section 2: Each membership shall include the wife or "lady" friend, any children of Hi-school or College age, not gainfully employed, out-of-town house guest, out-of-town business guests. Out-of-town, being defined as outside the immediate trade area of the Club. Memberships held by the women shall provide comparable guest privileges. Other guest privileges, such as "local guest night" or "special guests," shall be determined by the Board of Directors.

Article VI.

Club Relationship

Section 1: As stated in the Affiliation Agreement

of the Associated Executives Clubs, Inc., the local club is a recognized affiliate of all other Executives and Knife and Fork Clubs associated, and provisions of visiting are reciprocal in all other Clubs.

Article VII.

Amendments

Section 1: These By-laws, as they have been provided for the use of the local Club, may be amended by a two-thirds vote of the members present at any meeting of the Club, provided notice of the proposed amendment shall be given at a previous meeting or otherwise, to all members of the Club in good standing. [20]

EXHIBIT "B"

Working Agreement

Devoted to a Better Acquaintance Among America's
Business and Professional Aristocracy

This Working Agreement entered into this 19th day of July, 1944, between Associated Executive Clubs, Inc., a Delaware corporation, party of the first part, and the undersigned persons forming Butte, Montana, Executives Club, parties of the second part.

Whereby it is mutually agreed that said party of the first part will assist parties of the second part in formation and continuance of a local Club in above-named city. Party of the first part agrees to furnish, at its own expense, promotional service to assist parties of the second part in completing club membership. The club shall exist for the sole

purpose of promoting educational, patriotic, cultural, and scientific interest in the above-named city and state.

It is mutually agreed that one dollar per member shall be allotted for local expenses during first fiscal year and that all other income from initiation fee and dues, until end of first fiscal year on last day of June, 1945, shall be used by party of first part for organization work and guest speakers until end of first fiscal year. Fifty per cent of all collections shall be paid to party of first part as collected, and balance, after deducting \$1.00 per member for local budget, be remitted in equal installments on dates speakers appear. In case local expenses exceed \$1.00 per member, party of the first part agrees to defray all expenses approved in writing by its representatives.

First party agrees to furnish seven guest speakers during first fiscal year, also membership cards, newspaper mats, news stories, etc. Local Club agrees to furnish dining room, to pay federal, state and local taxes if any should be required, and any other necessary local expense, same to be defrayed from local budget, as specified above. An initiation fee of \$10.00 shall be collected for each member admitted to the Club at any time. Annual dues shall be \$10.00 per member payable in advance. (Dues shall be in addition to initiation fee for first year of each membership.) Each member shall pay for meals in addition to initiation fees and dues.

After first year, all dues and initiation fees shall

be used by local Club to pay speakers and for necessary local expense. Payment for each speaker shall be made on date of his appearance. It is agreed that, in contracting for speakers, party of the first part acts as agent of local Club, that such contracts are non-cancelable, and that party of the first part assumes no obligation for any expense except speakers' fees and local expense approved in writing by First Party or its agents.

All speakers shall be secured through party of first part during entire life of the Club. During first fiscal year party of first part is authorized to select guest speakers at its discretion. After first year, speakers shall be approved in writing at a personal meeting with representatives of first party, or notice of the selection of each speaker shall be submitted by first party in writing or by wire to local secretary. If name of speaker is submitted by wire, local secretary shall have forty-eight hours in which to wire veto on speaker offered; if submitted by letter, local secretary may file written veto at any time so that it will reach National office within ten days of time original offer is postmarked at National office. If no veto is filed within above time, speaker shall be considered approved and first party is authorized to contract definitely for same. For speakers appearing without charge or for expenses only, a service fee of \$25.00 shall be paid by local Club to party of first part after first year. Local Club agrees to grant reciprocity of

membership to all men's dinner clubs associated with party of [22] the first part.

No local person shall be liable under any circumstances for any obligation except local expense incurred without approval of first party, or its representative. First party shall have right to reorganize local Club should death, removal or other cause ever leave local organization without proper officers for conduct of its business.

ASSOCIATED EXECUTIVES
CLUBS, INC.

By ELMER E. SCHOLTZ,
Party of First Part.

BUTTE (MONTANA)
EXECUTIVES CLUB,
Parties of Second Part.

By TOM J. DAVIS,
JAMES TULLIS,
E. R. BLINN.

Filed Jan. 12, 1948. [23]

[Title of District Court and Cause.]

STIPULATION SUPPLEMENTING AGREED
STATEMENT OF FACTS

It Is Hereby Agreed and Stipulated between the respective counsel for the parties hereto that the

Agreed Statement of Facts, heretofore filed herein, and more particularly Paragraph X thereof, may be amended by interlineation in the following particulars, to-wit: by adding to the end of said Paragraph X the following words: "As set forth in Exhibit "C", hereto attached and made a part hereof," and by attaching Exhibit "C" to said Agreed Statement of Facts.

Dated this 17th day of February, 1948.

T. J. DAVIS,

L. C. MYERS,

Attorneys for Plaintiffs.

JOHN B. TANSIL,

U. S. Attorney,

HARLOW PEASE,

Assistant U. S. Attorney,

EMMETT C. ANGLUND,

Assistant U. S. Attorney,

Attorneys for Defendant.

Approved Feb. 18, 1948.

R. LEWIS BROWN,

Judge. [25]

EXHIBIT "C"

Treasury Department
Washington

Office of:

Commissioner of Internal Revenue

Address reply to:

Commissioner of Internal Revenue
and refer to MT:M:DCH Cl. A-18155

Feb. 26, 1946.

Butte Executives Club
First National Bank Building
Butte, Montana

Gentlemen:

Reference is made to your claim for refund of \$382.00, representing admissions tax paid for the month of September 1945.

You contend that the purpose of the club is the education of its members; that each person admitted to membership is charged an initiation fee of \$10.00 and annual dues of \$10.00 payable in advance; that during the month of September 1945 the club collected from its members payments aggregating \$1,910.00 and that the sum of \$382.00 representing the tax computed on such amount was illegally collected from the club.

The evidence shows that the Associated Executives Clubs, Incorporated, chartered under the laws of the State of Delaware, has for its purpose the sale of educational and entertainment talent, through its activities as a booking agency, and the

promotion and organization of local Executives Clubs in various cities throughout the United States. The parent organization derives its revenue from an organization fee and membership fee of \$10.00 collected by the local Executives Clubs from each member. [26]

The evidence on file in this office discloses that your organization has as its primary purpose the procuring of lectures for the education and entertainment of its members and their guests and the collection of annual or season fees to pay to the booking agent the charges for the lectures and incidental expenses.

The agreement with Associated Executives Clubs, Incorporated, provides that \$1.00 per member shall be allotted for local expenses during the first year and all other income shall be used by the corporation for organization work and the speakers. After the first year all dues and fees shall be used to pay the speakers and incidental expenses, payment for each speaker to be made on the date of his appearance. All speakers must be secured through the corporation during the entire life of the club.

On the basis of the above evidence, it was held in a letter addressed to you on September 24, 1945, that since the privilege afforded the members of the Executives Club of Butte, Montana, is primarily the right of admission to the series of lectures, the so-called membership fee of \$10.00 being collected for the purpose of paying for the lectures, such fee is an amount paid for admission by season ticket

or subscription and is subject to the tax imposed by section 1700(a) of the Internal Revenue Code, as amended.

The claim filed by you for refund of the tax paid is, therefore, rejected in full.

Very truly yours,

JOSEPH D. NUNAN, JR.,
Commissioner.

By /s/ D. S. BLISS,
Deputy Commissioner.

Filed Feb. 18, 1948. [27]

[Title of District Court and Cause.]

MOTION FOR SUBSTITUTION

To Theron Lamar Caudle, Assistant Attorney General, Andrew D. Sharpe, J. P. Wenchel, II, Special Assistants to the Attorney General, John B. Tansil, United States Attorney, Emmett C. Angland, Assistant United States Attorney, attorneys for defendant, Lewis Penwell, and to Lewis Fred Penwell and Susannah W. Penwell, Executor and Executrix respectively of the Estate of Lewis Penwell:

You and Each of You Please Take Notice that plaintiffs will on the 16th day of November, 1948, present to the Court the following motion for substitution:

Comes now the plaintiffs above named and move the Court for an order substituting Lewis Fred Penwell and Susannah W. Penwell, executor and executrix of the Estate of Lewis Penwell, for defendant, Lewis Penwell, on the grounds and for the reason that Lewis Penwell died subsequent to the filing of the complaint in the above entitled cause and said Lewis Fred Penwell and Susannah W. Penwell are the duly qualified and acting executor and [29] executrix of the Estate of said Lewis Penwell.

Dated this 27th day of October, 1948.

T. J. DAVIS,

L. C. MYERS,

Attorneys for Plaintiffs.

Service of foregoing Motion for Substitution acknowledged and copy received this 27th day of October, 1948.

JOHN B. TANSIL,

EMMETT C. ANGLAND,

Attorneys for Defendant.

Filed Nov. 10, 1948. [30]

[Title of District Court and Cause.]

ORDER OF SUBSTITUTION OF
PARTIES DEFENDANT

Upon motion of plaintiffs above named, it appearing to the Court that defendant Lewis Penwell died subsequent to the filing of complaint in the above entitled cause and that this is a proper cause, therefor; and it further appearing that all the parties, through counsel, have submitted the matter to the court:

It Is Ordered that Lewis Fred Penwell and Susannah W. Penwell, executor and executrix of the estate of defendant Lewis Penwell, be substituted as defendants for defendant Lewis Penwell, deceased.

CHARLES N. PRAY,
Judge.

Dated November 19, 1948.

Filed and Entered Nov. 19, 1948. [32]

In the United States District Court, in and for the
District of Montana, Helena Division

Civil Action No. 350

JOHN N. NEWLAND, JAMES TULLIS,
GEORGE I. MARTIN, and BUTTE
EXECUTIVES CLUB, a non-profit unin-
corporated association,

Plaintiffs,

vs.

LEWIS PENWELL, individually and as COL-
LECTOR OF INTERNAL REVENUE FOR
THE DISTRICT OF MONTANA,

Defendant.

DECISION

This is an action to recover taxes alleged to have been illegally assessed and collected by the Collector of Internal Revenue. A claim for refund was filed under Sec. 3772, Title 26, U.S.C.A. by the "Butte Executives Club," by whom the tax was paid. The members of this club or association paid ten dollars as an initiation fee and also an annual dues charge of ten dollars, and the question seems to be whether these payments, or either of them, may be considered in the sense of an "admission to any place."

An agreed statement of facts is filed with the briefs, and from the facts agreed to, it appears that

paragraph 6 of Section 101.2 of the Regulations of the Commissioner of Internal Revenue, would have special application here, reading as follows: "Where a person or organization acquires the sole right to use any place or the right to dispose of all the admissions to any place for one or more occasions, the amount paid for such right is not subject to the tax on admissions. However, if the person or organization in turn sells admissions to the place, the tax will apply to amounts paid for such admissions." Under the foregoing regulation and the admitted facts, counsel contend that the club has the sole right to dispose of admissions to members or members and guests, and that no admissions are sold, and therefore the club and the amounts in question are not taxable.

It seems quite evident from a plain reading of Section 1710, U. S. C. A., Title 26, that it would not apply to a club organized [34] "for the education of its members through informational talks." Exhibit A, By-Laws, Article II, Section 1. To further emphasize the educational purpose of the club it is also provided in Exhibit B that the club shall exist for "the sole purpose of promoting educational, patriotic, cultural and scientific interest in the above-named city and state." A number of cases have been cited showing plainly the difference between an educational club and a social club which would lend weight to plaintiff's construction of the definition found in Section 101.25 of Regulation 43, and it is further contended that even if the Butte Club could be classified as a social club, it would not be subject to the tax because of the size of the

initiation fee and annual dues under Section 1710, Title 26, as amended, and Section 1712(b), Title 26, U. S. C. A.

The court is unable to agree with the contention that this court is without jurisdiction to hear this cause; there seems to be abundant authority to the contrary. Title 28, Sec. 41(5), U. S. C. A. Rule 17(b) and 23, Rules of Federal Procedure; *Builders Club of Chicago vs. U. S.*, 14 Fed. Supp. 1020.

The court has considered briefs of counsel, statutes, regulations, rules and authorities cited, and without further amplifying this decision, is of the opinion that it satisfactorily appears that the club in question is entitled to a refund of the taxes paid, and such is the order herein. Accordingly, findings and conclusions may be submitted, and form of judgment; each side bearing its own costs.

CHARLES N. PRAY,

Judge.

Filed January 13, 1949.

Entered and noted in civil docket January 14, 1949. [35]

[Titles of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

The parties in the above entitled cause having submitted to the Court an agreed statement of facts,

the Court finds the facts to be as stipulated and said agreed statement of facts is incorporated herein, among which facts it appears that the Butte Executives Club collected an aggregate amount of \$1910.00 from its members for the year from July 1, 1945, to July 1, 1946, and that the Commissioner of Internal Revenue treated the said collection as payments "for admission to any place" and collected from plaintiff, Butte Executives Club, upon the 20th day of October, 1945, the sum of \$382.00 as a tax upon "admissions to any place."

Conclusions of Law

From the foregoing stipulated facts, the Court draws the following conclusions of law, to-wit:

1. That the tax was illegally assessed and collected; [37]

2. That the Butte Executives Club, plaintiff, is entitled to a refund of the tax paid on the 20th day of October 1945, in the sum of \$382.00, together with interest at six per cent from said day; that each of the parties should bear their respective costs.

Done In Open Court this 5th day of February, 1949.

CHARLES N. PRAY,

Judge.

Filed Feb. 5, 1949. [38]

In the District Court of the United States for the
District of Montana, Helena Division

Civil No. 350

JUDGMENT

JOHN N. NEWLAND, JAMES TULLIS,
GEORGE I. MARTIN, and BUTTE EXECU-
TIVES CLUB, a non-profit unincorporated
association,

Plaintiffs,

vs.

LEWIS FRED PENWELL and SUSANNAH W.
PENWELL, executor and executrix of the
estate of Lewis Penwell, deceased, defendants,
substituted in place of Lewis Penwell, Collector
of Internal Revenue for the District of Mon-
tana,

Defendants.

This cause having been heretofore submitted to
Honorable R. Lewis Brown, upon an agreed state-
ment of facts and briefs, and said Judge having
died prior to rendering a decision, and Judge
Charles N. Pray having on the 19th day of Novem-
ber, 1948, accepted jurisdiction upon stipulation of
the parties to decide the matter, and after due con-
sideration of the matter by the court, and upon the
5th day of February, 1949, the Court having made
its findings of fact and conclusions of law as fol-
lows, to-wit:

“Findings of Fact and
Conclusions of Law

“The parties in the above entitled cause having submitted to the Court an agreed statement of facts, the Court finds the facts to be as stipulated and said agreed statement of facts is incorporated herein, among which facts it appears that the Butte Executives Club collected an aggregate amount of \$1910.00 from its members for the year from July 1, 1945, to July 1, 1946, and [40] that the Commissioner of Internal Revenue treated the said collection as payments “for admission to any place” and collected from plaintiff, Butte Executives Club, upon the 20th day of October, 1945, the sum of \$382.00 as a tax upon “admissions to any place.”

“Conclusions of Law

“From the foregoing stipulated facts, the Court draws the following conclusions of law, to-wit:

“1. That the tax was illegally assessed and collected;

“2. That the Butte Executives Club, plaintiff, is entitled to a refund of the tax paid on the 20th day of October, 1945, in the sum of \$382.00, together with interest at six per cent from said day; that each of the parties should bear their respective costs.” And upon being fully apprised in the premise,

The Court orders, adjudges and decrees, and this does order, adjudge and decree that the plaintiff, Butte Executives Club, does have and recover of the defendants, Lewis Fred Penwell and Susannah W. Penwell, executor and executrix of the estate of

Lewis Penwell, deceased, substituted in the place of Lewis Penwell, Collector of Internal Revenue for the District of Montana, the sum of \$382.00, together with interest from the 20th day of October, 1945, at the rate of six per cent; the parties hereto each to bear the costs by them incurred in the action.

Done In Open Court this 5th day of February, 1949.

CHARLES N. PRAY,
Judge.

Filed February 5, 1949.

H. H. WALKER,
Clerk.

By /s/ C. G. KEGEL,
Deputy.

Entered and noted in Civil Docket Feb. 7, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the above named plaintiffs and to

T. J. Davis and L. C. Myers, their attorneys:

Notice Is Hereby Given that Lewis Penwell, individually and as Collector of Internal Revenue, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered

in this cause on the 5th day of February, 1949, in favor of the plaintiffs and against the defendant, and from the whole of said judgment.

Dated April 6, 1949.

JOHN B. TANSIL,

U. S. Attorney,

HARLOW PEASE,

Assistant U. S. Attorney,

EMMETT C. ANGLAND,

Assistant U. S. Attorney,

Attorneys for Defendants.

Service of the foregoing notice of appeal is hereby admitted this 6th day of April, 1949.

T. J. DAVIS,

L. C. MYERS,

Attorneys for Plaintiffs.

Filed April 6, 1949.

[Title of District Court and Cause.]

ORDER

Upon application of the United States Attorney for the District of Montana and good cause appearing:

It Is Hereby Ordered that the defendant in the above-entitled cause have thirty (30) days in addition to the time allowed by law for docketing and filing the record on appeal pursuant to Rule 73G of the Rules of Civil Procedure.

Dated this 13th day of May, 1949.

CHARLES N. PRAY,
Judge.

Filed May 13, 1949.

Entered and noted in Civil Docket, May 14, 1949.

[Title of District Court and Cause.]

DESIGNATION

Comes now the above named defendants who were on the 9th day of November, 1948 substituted as defendants for Lewis Penwell, individually and as Collector of Internal Revenue for the District of Montana, and designate the portions of the record and proceedings to be contained in the record on appeal herein:

The defendants designate the entire record herein.

including the Complaint, the Answer, the Agreed Statement of Facts, the Decision of the Court, the Court's Findings of Fact and Conclusions of Law, and the Judgment as entered.

Dated this 26th day of May, 1949.

JOHN B. TANSIL,

U. S. Attorney,

HARLOW PEASE,

Assistant U. S. Attorney,

EMMETT C. ANGLAND,

Assistant U. S. Attorney,

Attorneys for Defendants.

Service of the foregoing Designation is hereby admitted this 26th day of May, 1949.

T. J. DAVIS,

L. C. MYERS,

Attorneys for Plaintiffs.

Filed May 26, 1949.

[Title of District Court and Cause.]

ORDER

Upon application of the United States Attorney for the District of Montana and good cause appearing:

It Is Hereby Ordered that the defendant in the

above entitled cause have ten days in addition to the time heretofore allowed for docketing and filing the record on appeal pursuant to Rule 73G of the Rules of Civil Procedure.

Dated this 14th day of June, 1949.

CHARLES N. PRAY,
Judge.

Filed June 14, 1949.

Entered and Noted in Civil Docket, June 15, 1949.

In the District Court of the United States in and
for the District of Montana

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of forty-nine pages, numbered consecutively from 1 to 49 inclusive, constitutes a full, true and correct transcript of all portions of the record in Case No. 350, John N. Newland, et al., vs. Lewis Fred Penwell, et al., designated by the parties as the record on appeal therein, as appears from the original records and files of said Court in my custody as such clerk.

I further certify that the costs of said transcript

amount to the sum of Fourteen and 20/100 Dollars (\$14.20) and have been made a charge against the United States, the appellant.

Witness my hand and the seal of said court at Helena, Montana, this 15th day of June, A.D. 1949.

[Seal] /s/ H. H. WALKER,

Clerk U. S. District Court, District of Montana.

[Endorsed]: No. 12271. United States Court of Appeals for the Ninth Circuit. Lewis Fred Penwell and Susannah W. Penwell, Executor and Executrix of the Estate of Lewis Penwell, formerly Collector of Internal Revenue for the District of Montana, deceased, Appellants, vs. John N. Newland, James Tullis, George I. Martin, and Butte Executives Club, a non-profit unincorporated association, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed June 17, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

Statement of Points on Which Appellants Intend
to Rely on Appeal

The points upon which the appellants (defendants below) intend to rely on appeal are:

1. The court erred by holding that the initiation fee of \$10 and the dues of \$10 collected from each member of the Butte Executives Club were not charges for admission to any place as that term is used in Section 1700 (a) (1) of the Internal Revenue Code.

2. The court erred by rendering judgment for appellees (plaintiffs below).

/s/ THERON L. CAUDLE,
Assistant Attorney General.

Docketed.

Filed July 15, 1949, U.S.C.A.

In the United States Court of Appeals
for the Ninth Circuit

No. 12271

LEWIS FRED PENWELL and SUSANNAH W.
PENWELL, Executor and Executrix of the
Estate of LEWIS PENWELL, deceased,
Appellants,

vs.

JOHN N. NEWLAND, JAMES TULLIS,
GEORGE I. MARTIN, and BUTTE EX-
ECUTIVES CLUB, a non-profit unincorpor-
ated association,

Appellees.

DESIGNATION OF RECORD TO BE PRINTED

The appellants hereby designate the entire record
on appeal to be printed.

/s/ THERON L. CAUDLE,
Assistant Attorney General.

Docketed.

Filed July 15, 1949, U.S.C.A.

**In The United States
Court of Appeals**
For the Ninth Circuit

LEWIS FRED PENWELL and SUSANNAH W. PENWELL,
Executor and Executrix of the Estate of Lewis Penwell,
formerly Collector of Internal Revenue for the District
of Montana, deceased, Appellants

v.

JOHN N. NEWLAND, JAMES TULLIS, GEORGE I. MART-
IN, and BUTTE EXECUTIVES CLUB, a non-profit un-
incorporated association, Appellees

**On Appeal from the United States District Court
for the District of Montana**

Brief for the Appellants

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the District Court (R. 33-35) is not reported.

JURISDICTION

This appeal involves federal admission taxes. The taxes in dispute were paid on October 28, 1945. (R. 4-5.) Claim for refund was filed on December 5, 1945 (R. 8-9), and was rejected by notice dated February 26, 1946 (R. 28-30). Within the time provided in Section 3772 of the Internal Revenue Code and on December 31, 1946, the taxpayer brought an action in the United States District Court of Montana for recovery of taxes paid. R. 2-7. Jurisdiction was conferred on the District Court by 28 U.S.C., Sec. 1340. The judgment was entered on February 7, 1949. (R. 37-39.) Notice of appeal was filed April 6, 1949 (R. 39-40), pursuant to the provisions of 28 U.S.C., Sec. 1291.

QUESTIONS PRESENTED

1. Whether amounts collected as dues and initiation fees by the Butte Executives Club and which are used almost exclusively by the club to pay for lectures to which only members and their guests are admitted, are subject to the imposition of admission taxes, under Section 1700 (a) of the Internal Revenue Code.

2. Whether the Butte Executives Club was entitled to maintain the suit, not having submitted a

list of the members, power of attorney authorizing the club to act as agent, and a copy of the by-laws and constitution of the club, as required by Section 101.42 of Treasury Regulations 43.

3. Whether the individuals, Newland, Tullis and Martin, are entitled to maintain this action on behalf of the Butte Executives Club.

STATUTE AND REGULATIONS INVOLVED

These are set forth in the Appendix, *infra*.

STATEMENT

The facts as found by the District Court (R. 35-36) and as stipulated by the parties (R. 14-30) may be summarized as follows:

The Butte Executives Club was organized as a non-profit, unincorporated organization in July, 1944 (R. 15), as an affiliated member of the Associated Executives Clubs, Inc., of Delaware (R. 19, Ex. A; R. 23, Ex. B).

During the month of September, 1945, the club consisted of 163 members. The members were required to pay an initiation fee of \$10 upon entering or joining the club and annual dues of \$10 per year. During the month in question, September, 1945, a

total of \$1,910 was collected from club members, consisting of \$280 as initiation fees from 28 new members, and \$1,630 as annual dues from its 163 members. (R. 17.)

The Butte Executives Club is affiliated with the Associated Executives Club, Inc., which is chartered under the laws of the State of Delaware. The purpose of this latter organization is the production of education and entertainment talent through its activities as a booking agency, and the promotion and organization of local Executives Clubs in cities throughout the United States, as an outlet for such talent booked by them. (R. 16.)

The Associated Executives Club, Inc., receives all monies collected as dues and as initiation fees, except for the amount of \$1 per member collected by each local club during and until the end of the first fiscal year of the local club, the latter club receiving in return therefor guest speakers during the first fiscal year, membership cards and other organizational work. After the first year the working agreement provides that all monies collected as dues and as initiation fees are to be retained by the local, in this case, the Butte Executives Club, and are to be used in payment of speakers, to be secured solely through

the parent or Associated Executives Club, Inc. (R. 16.)

Admission to the lectures is by membership card only, and is restricted to members and qualified guests, as provided in the by-laws of the Butte Executives Club. The only benefit derived by the members and the only thing of value received in return for a \$10 initiation fee and annual dues of \$10 is the privilege of attending the lectures scheduled by the Butte Executives Club and the privilege of taking guests. (R. 17.)

On October 28, 1945, the sum of \$382 was levied and collected as admission taxes on the aggregate amount of \$1,910, collected by the Butte Executives Club from its members for its fiscal year, July 1, 1945, to July 1, 1946 (R. 18), which amount was denominated by it as dues in the amount of \$1,630, and initiation fees in the amount of \$280 (R. 12).

The Butte Executives Club thereafter filed a claim for refund in the amount of \$382 (R. 7, 18), and this claim was subsequently rejected by the Commissioner of Internal Revenue February 26, 1946 (R. 28).

The Butte Executives Club brought suit for refund and was given judgment in the District Court. (R. 37-39.)

STATEMENT OF POINTS TO BE URGED

1. The court erred in holding that the initiation fee of \$10 and the dues of \$10 collected from each member of the Butte Executives Club were not charges for admission to any place as that term is used in Section 1700 (a) (1) of the Internal Revenue Code.

2. The claim for refund by the Butte Executives Club was not accompanied by powers of attorney executed by each member authorizing the club to act as his agent. The individuals, Newland, Tullis, and Martin, are not entitled to maintain this action on behalf of the Butte Executives Club since they did not file a claim for refund and since they cannot bring themselves within Rule 23 (a) of the Federal Rules of Civil Procedure.

SUMMARY OF ARGUMENT

1. The admissions tax should have been imposed on the dues and initiation fees in this case since the primary benefit obtained by this payment was the privilege of admission to a series of lectures. The means devised to avoid this tax have been varied. To subject this charge to the admissions tax would follow the judicial and administrative trend of defeating these means. Further, the fees of the Butte

Executives Club clearly come within the scope of admission charges rather than that of dues and initiation fees.

2. The Treasury Regulations provide that powers of attorney must be filed authorizing the club to act as agent. This was not done; hence, since the regulation is reasonable and is deemed to have Congressional approval, the club cannot prevail. Similarly, the individual members cannot prevail on behalf of the club, since they did not file claims for refund and cannot bring themselves within the provisions of Rule 23 (a) of the Federal Rules of Civil Procedure.

I.

ARGUMENT

The District Court erred in holding that the initiation fee of \$10 and the dues of \$10 collected from each member of the Butte Executives Club were not charges "for admission to any place."

The admissions tax is precisely what it purports to be, i.e., a tax on an admission charge "to any place," as that term is defined in Section 101.3 of Regulations 43 (Appendix, *infra*).

Admission charges masquerading under another name have been gradually ferreted out and subjected

to the tax of Section 1700 (a) (1) of the Internal Revenue Code (Appendix, *infra*). A toll charge on a private road leading to a resort was judged to be levied actually for the privilege of using the amusement and not for the use of the road. **Chimney Rock Co. v. United States**, 63 C. Cls. 660, certiorari denied, 275 U.S. 552. A student activities fee, after some earlier equivocation, has been held to be a proper base for this tax. Min. 5834, 1945 Cum. Bull. 446. A season ticket is a proper subject for the admissions tax. M.T. 6, 1942—2 Cum. Bull. 245. Clubs having additional dues for the use of extra facilities are subject to the tax on those dues. S.T. 859, 1937—1 Cum. Bull. 334; **Exmoor Country Club v. United States**, 119 F. 2d 961 (C.A. 7th). A so-called political contribution was held to be a facade for an admissions charge when the size of the contribution was determinative of the kind of seat obtained. S.M. 2853, IV—1 Cum. Bull. 294 (1925). In **Twin Falls Natatorium v. United States**, 22 F. 2d 307 (S.D. Ohio), and **United States v. Koller**, 287 Fed. 418 (W.D. Wash.), admission taxes were sustained on charges to patrons of swimming pools and skating rinks, the taxpayer mistakenly alleging that this was a rental and not an admissions charge.

There are still myriad ways in which the admissions tax is being avoided by the process of putting it under a different rubric. Lent, *The Admissions Tax*, 1 *National Tax Journal* 31-50 (1948).

It is strongly urged that just such a situation is presented in the case at bar, and that what we have here is an admissions charge erroneously denominated as dues or as initiation fees.

Three stipulated facts illustrate persuasively the reality of this contention. Admission to the lectures is by membership card only and is restricted to members and qualified guests; the only thing of value received in return for the payment of the initiation fee and annual dues is the privilege of attending the scheduled lectures; and additional payment is always made for food and other services furnished at the lectures.

In addition, it should be noted that the usual concomitant features of a club are non-existent—no clubhouse, no athletic facilities, no charitable venture for the organization, no social privileges—in short, the privilege afforded the members of this club is primarily the right of admission to the series of lectures. The so-called membership fee of \$10 is collected merely for the purpose of paying for the

lectures. Hence, it necessarily follows that such a fee is an amount paid for admission by season ticket or subscription and is subject to the tax imposed by Section 1700 (a) of the Internal Revenue Code.

If the lectures had been given separately without the existence of the club, then Section 1700 (a) would clearly apply. It is the position of the appellants that something substantially similar occurred, and that the mere existence of a “front”, i.e., the Butte Executives Club, should not mislead the court as to the actualities of the situation. In federal tax law, the courts have been particularly adept in looking through form to the substance of a transaction.

Inserting these charges into the category of dues or initiation fees seem obviously wrong. The concept of dues is well stated in **White v. Winchester Club**, 315 U. S. 32, 41:

* * * payment for the right to repeated and general use of a common club facility for an appreciable period of time has that element and amounts to a “due or membership fee” if the payment is not fixed by each occasion of actual use”.

As the benefits received consisted of seven lectures a year, then this clearly comes within the category of a season ticket (M.T. 6, 1942-2 Cum. Bull. 245) rather than that of dues and initiation fees.

Further, the District Court's statement concerning the educational exclusion under Section 1710 of the Internal Revenue Code is erroneous and irrelevant. The educational exemption of Section 1700 was repealed in 1941. The query here relates to taxability under Section 1700; there is no question involved of taxation under 1710.

The District Court was in error in treating this charge as coming within the purview of the sixth paragraph of Article 101.2 of Regulations 43 (Appendix, *infra*). This paragraph stipulates that where a person or organization acquires the sole right to use any place or the right to dispose of all the admissions to any place for one or more occasions, the amount paid for such right is not subject to the tax on admissions. It also provides, however, that if the person or organization in turn sells admissions to the place the tax will apply to amounts paid for such admissions.

Alternatively, it seems evident that even if paragraph six is applicable, the tax still applies because

the club, though it secures lecturers and dining rooms, charges members for admittance.

However, paragraph five of Article 101.2 of Regulations 43 seems to be the more fitting of categories here. It provides that where the chief or sole privilege—

of a so-called membership is a right of admission to certain particular performances or to some place on a definite number of occasions (as contrasted with a more or less unlimited right to enter a clubhouse or other place as many times as desired during a year or some other period),

then the amount paid for such so-called membership is an amount paid for admission.

A reading together of these two paragraphs argues persuasively for the appellants' position and places the fees of the Butte Executives Club squarely within Section 1700 (a) of the Internal Revenue Code.

II.

The District Court erred in permitting the Butte Executives Club to prevail as party plaintiff
Section 101.42 of Regulations 43 (Appendix, *infra*)

provides that where a club as agent of its members seeks a refund, the claim must be accompanied by the following: A list of names of the members, powers of attorney from these members, and a copy of the constitution and by-laws of the club. This prescribed form was not followed by the appellees in this case; hence, they cannot recover. The clear intent of the club to act as agent for its members should be noted in the conclusion to the complaint (R. 6):

Plaintiffs pray that they be permitted to maintain this action for and on behalf of all of the members of the Butte Executives Club * * *.

In **Builders' Club of Chicago v. United States**, 14 F. Supp. 1020, 1022, the Court of Claims held this regulation invalid, stating:

A departmental regulation which treats the club merely as an agent of its members and requires that the individual club members each file claim for refund for the taxes paid by the club or give to the club duly executed powers of attorney to act as their agent is obviously legislation in the

guise of a regulation and therefore invalid.

The Court of Claims would probably not now conform to its former view of the law. See **Engineer's Club of Philadelphia v. United States**, 42 F. Supp. 182, 188, and concurring opinion by Judge Whitaker, certiorari denied, 316 U. S. 700.

In **Turks Head Club v. Broderick**, 166 F. 2d 877 (C.A. 1st), the court upheld these Regulations requiring the filing of powers of attorney. The touchstone for the court's decision was the fact that the tax was upon the members and not upon the club.

This is a sound distinction and is exactly the one made between the taxes imposed under Section 1700 (a) and (e) of the Internal Revenue Code. In the latter case, it (the cabaret tax) is imposed on the person receiving payment and that person is given the right to sue. In **123 East Fifty-Fourth Street v. United States**, 157 F. 2d 68 (C.A. 2d), even though the claimant restaurant had not refunded the cabaret tax to the customers, it could recover because the restaurant owner was designated as the taxpayer by the taxing statute. In Section 1700 (a), it (the admissions tax) is imposed on the person paying for the admission and only he can sue. Illus-

trative of this principle is **Twentieth Century Sporting Club v. United States**, 34 F. Supp. 1021 (Cls.), where the corporation was not allowed to recover alleged overpayments because the taxing statute had named the person paying for admission as the legal taxpayer.

In the instant case, the tax is imposed on the members and only they are entitled to recover directly or by giving power of attorney and thus recovering indirectly.

The obvious purpose of this provision is to protect the Government from liability to the legally designated taxpayers, the members of the club, after a refund has been claimed by and possibly paid to the club. For purpose of administration, an arbitrary rule of this nature must exist **regardless of who pays the tax.**

Further, the provision of the Regulations requiring powers of attorney by members has appeared in every revision of the Regulations since 1926.

The law is well settled, as stated in **Helvering v. Winmill**, 305 U. S. 79, 83:

Treasury regulations and interpretations long continued without substantial change, applying

to unamended or substantially reenacted statutes are deemed to have received congressional approval and have the effect of law.

To the same effect, see **Helvering v. Reynolds Co.**, 306 U. S. 110; and Brown, Regulations, Reenactment, and the Revenue Acts, 54 Harv. L. Rev. 377 (1941).

Palpably, then, since the powers of attorney were not filed, the Butte Executives Club cannot prevail in this action.

The judgment of the District Court was in favor of the appellee club and not in favors of the individuals, Newland, Tullis and Martin. Therefore, the query relative to the recovery of these individuals is not in question here as it was in the court below.

Nevertheless, these individuals cannot recover on behalf of the Butte Executives Club for precisely the same reason they cannot recover themselves, i.e., they have not filed claims for refund, a condition precedent to the institution of suit under Section 3772 of the Internal Revenue Code. The administrative remedy must be exhausted before resort can be had to the courts.

In addition, there is no submission that the club

authorized these three members to maintain and prosecute the suit for it.

Further, these individuals cannot maintain this action under Rule 23 of the Federal Rules of Civil Procedure as a class action. Necessity is the **raison d'être** of the class suit doctrine. Since the owner of the primary right, the Butte Executives Club, does have the right to prosecute this suit if the proper procedure is used, it follows that these individuals are precluded from maintaining the suit on behalf of the members of the club.

As far as clause 2 of Rule 23 is concerned, there is no allegation that these individuals have any right to or interest in the subject matter of the suit.

The action cannot be brought under clause 3 since there does not exist a question common to the individuals and the club.

CONCLUSION

We therefore submit that the judgment of the District Court should be reversed.

Respectfully submitted,

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September, 1949.

APPENDIX

Internal Revenue Code:

SEC. 17 (as amended by Sec. 541, Revenue Act of 1941, c. 412, 55 Stat. 687; Joint Resolution of July 23, 1943, c. 521, 56 Stat. 703; and Sec. 302, Revenue Act of 1943, c. 63, 58 Stat. 21). TAX.

There shall be levied assessed, collected, and paid—

(a) **Single or Season Ticket; Subscription.**—

(1) **Rate.**—A tax of 1 cent for each 5 cents or major fraction thereof of the amount paid for admission to any place, including admission by season ticket or subscription. In the case of persons (except bona fide employes,

municipal officers on official business, children under twelve years of age, members of the military or naval forces of the United States when in uniform, members of the military or naval forces of any of the United Nations, when in uniform, and members of the Civilian Conservation Corps when in uniform) admitted free or at reduced rates to any place at any time when and under circumstances under which an admission charge is made to other persons, an equivalent tax shall be collected based on the price so charged to such other persons for the same or similar accommodations, to be paid by the person so admitted. No tax shall be imposed on the amount paid for the admission of a child under twelve years of age if the amount paid is less than 10 cents. Amounts paid on and after October 1, 1941, for admission to theatres and other activities operated by or under the control of the War Department or the Navy Department within posts, camps, reservations, and other areas maintained by the Military or Naval Establishment shall be exempt from

the tax imposed by this section: **Provided,** That the net proceeds from said admission charges are used exclusively for the welfare of the military or naval forces of the United States.

(2) **By whom paid.**—The tax imposed under paragraph (1) shall be paid by the person paying for such admission.

* * * * *

(26 U.S.C. 1946 ed., Sec. 17.)

Treasury Regulations 43 (1941 ed.), promulgated under the Internal Revenue Code:

Sec. 101.2 **Meaning of “Admission.”**—The tax is imposed on “the amount paid for **admission** to any place,” and applies to the amount which **must be paid** in order to gain admission to a place. (See section 101.4.) The term “admission” means the right or privilege to enter into a place. The law specifically provides that it shall also include “seats and tables, reserved or otherwise and other similar accommodations.” A charge for their use in any place must, therefore, be treated as a taxable charge for admission. So an amount paid for the right to use a reserved seat in a theater or circus, a seat in a room or win-

dow to view a parade, or the like, is taxable. This is true whether the charge made for the use of the seat, table, or similar accommodation is combined with an admission charge proper to form a single charge, or in separate and distinct from an admission charge, or is itself the sole charge. The tax under section 1700 (a) as amended does not apply, however, to admissions to or charges for seats and tables in a cabaret, roof garden, or similar place which are subject to the provisions of section 1700 (e) of the Code as amended. (See sections 101.13 and 101.14.)

Where an original admission charge carries the right to remain in a place, or to use a seat or table, or other similar accommodation, for a limited time only, and an additional charge is made for an extension of such time, the extra charge is paid for "admission" within the meaning of the Code.

The amount paid for admission by season ticket is a fixed sum which entitles the holder to admission on definite dates to a series of scheduled attractions, or to admission at all times during the season, and the form of the ticket is not controlling.

A subscription ticket is one which is issued to a person who subscribes a sum of money to the expense of an entertainment or who agrees to bear a portion of the expense thereof when the amount is ascertained.

An amount paid to become regularly entitled to the privileges of a club or other organization, as member or otherwise, is not an "amount paid for admission" even though one of the privileges be the right to enter a clubhouse, club grounds, gymnasium, swimming pool, or the like. But where the chief or sole privilege of a so-called membership is a right of admission to certain particular performances or to some place on a definite number of occasions (as contrasted with a more or less unlimited right to enter a clubhouse or other place as many times as desired during a year or some other period), then the amount paid for such so-called membership is an "amount paid for admission" within the meaning of the Code. An entirely different tax is levied on amounts paid as initiation fees or as dues or membership fees to certain classes of clubs or organizations, and also upon life

members of such clubs, by section 1710 of the Code. (See Subpart F.)

Where a person or organization acquires the sole right to use any place or the right to dispose of all the admissions to any place for one or more occasions, the amount paid for such right is not subject to the tax on admissions. Such a transaction constitutes a rental of the entire place and of the attraction, if any, whether or not it is so designated. However, if the person or organization in turn sells admissions to the place the tax will apply to amounts paid for such admissions.

If a charge imposed on a person admitted to a place is designated as an admission it will be presumed that it is in fact an admission charge, even though it includes rental of property or services, such, for example, as a charge of 50 cents for admission to a swimming pool, including use of a suit. The tax will apply in such case unless it is clearly shown that the charge is for rental or services, and that persons who do not use the property or services offered (e.g., use of a swimming suit) are admitted free. On the

other hand, the designation of a charge as a rental or service charge (e.g., a charge for use of a swimming suit) will not avoid the application of the tax if it in fact represents a charge for admission, or includes the right to admission. If the same charge is made to the person using or furnishing his own property or equipment, as where property or equipment is furnished by the management, such charge is an amount paid for admission and subject to tax. If a lesser charge is made to persons who do not desire to use the property or services offered, the lesser charge represents the admission charge.

Sec. 101.3 Meaning of the Term "Place."

—The tax under section 1700 (a) of the Code is on the amount paid for admission **to any place**. "Place" is a word of very broad meaning, and it is not defined or otherwise limited by the Code. But the basic idea it conveys is that of a definite inclosure or location. The phrase "to any place," therefore, does not narrow the meaning of the word "admission," except to the extent that it implies that the admission is to a definite inclosure or location.

The inclosure or location may be on above, or beneath the surface of the earth. Places of amusement obviously constitute the most important class of places admission to which is subject to this tax.

Sec. 101.42 Abatement or Refund of Erroneous or Illegal Assessments or Collections.
—A claim for abatement or refund of taxes alleged to have been erroneously or illegally assessed or paid (or of any penalties assessed or collected without authority) must be filed by the person against whom they were assessed, or by whom they were in the first instance erroneously or illegally paid. The claim should be prepared on Form 843 and presented to the collector of internal revenue for the district in which the amount claimed was assessed or paid. (See section 3313 of the Code.)

In any case where a club as agent of its members seeks a refund of tax collected by the club and paid over by it to the collector of internal revenue, since the members and not the club are the actual taxpayers, the claim must be accompanied by the following:

(a) An alphabetical list of the names of the taxpayers, showing the amount claimed for refund in behalf of each, and the dates on which the amounts were paid to the collector of internal revenue.

(b) A power of attorney executed by each person in whose behalf the claim is filed authorizing the organization to act as his agent. The power of attorney must be prepared in the usual form of such instruments; must be acknowledged before a notary public or signed in the presence of two witnesses, and must include a statement that any revocation thereof will not be effective until the Commissioner receives notification.

(c) A copy of the constitution and by-laws or other rules and regulations of the organization, together with a copy of each amendment thereto.

If a member files a refund claim himself there must be attached to the claim a statement of a responsible officer of the organization showing the date or dates when the amounts claimed were paid to the organization and the date or dates when the organization

paid over such amounts to the collector.

If an amount claimed was collected by direct assessment against an individual member, the claim must be made in the name of the member and must set forth the date and place of payment and additional data sufficient to enable the Commissioner to pass upon its merits.

In the case of a deceased member, evidence of the authority to file the refund claim in his behalf must be submitted.

(a) An alphabetical list of the names of the taxpayers, showing the amount claimed in refund in behalf of each, and the dates on which the amounts were paid to the collector of internal revenue.

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No. 12271

In The United States Court of Appeals

For the Ninth Circuit

LEWIS FRED PENWELL and SUSANNAH W. PENWELL, Executor and Executrix of the Estate of Lewis Penwell, formerly Collector of Internal Revenue for the District of Montana, deceased,

Appellants,

vs.

JOHN N. NEWLAND, JAMES TULLIS, GEORGE I. MARTIN; and BUTTE EXECUTIVES CLUB, a non-profit unincorporated association,

Appellees.

On Appeal from the United States District Court
for the District of Montana

Brief for the Appellees

CIRCUIT COURT IS WITHOUT JURISDICTION

The Court is without jurisdiction to consider this appeal for the reason that the notice of appeal that was given, which appears on page 39 of the Record, recites that Lewis Penwell, individually and as Collector of Internal Revenue, is prosecuting the appeal. The said notice was served and filed on April 6, 1949. On November 19, 1948, the District Court made an order substituting Lewis Fred Penwell and Susannah W. Penwell, Executor and Executrix of the Estate of Lewis Penwell, for defendant Lewis Penwell, deceased (R. 32). The judgment which appellant seeks to reverse is against Lewis Fred Penwell and Susannah W. Penwell, Executor and Executrix of the Estate of Lewis Penwell, deceased, defendants substituted in place of Lewis Penwell, Collector of Internal Revenue for the District of Montana (R. 37-39).

The rule seems universal that only a party may appeal. Rule 73 (a) of Federal Rules provides:

... a party may appeal from a judgment by filing with the district court a notice of appeal."

Rule 73 (b) provides: ---

"The notice of appeal shall specify the parties taking the appeal; . . ."

SUPPLEMENTING APPELLANTS' STATEMENT

The agreed statement of facts provides:

"The stated purpose of plaintiff, Butte Executives Club, is as stated in Exhibits 'A' and 'B' " attached and made a part of said statement of facts. (Paragraph 1X, R. 17.)

Exhibit "A" provides:

"Section 1: The purpose and objects of this organization shall be, for education of its members through informational talks." (R. 19.)

Exhibit "B" provides:

"The club shall exist for the sole purpose of promoting educational, patriotic, cultural, and scientific interest in the above-named city and state." (R. 23-24.)

The District Court held in its decision (R. 33-34), that Section 1710, U. S. C. A., Title 26, did not apply to such a club as it could not be classified as social. Further, that even though it were social, it would not be taxed because of the size of the initiation fee and the annual dues.

There can be no doubt that the Butte Executives Club is a club and that the members attended meetings.

QUESTIONS PRESENTED

We are concerned with the query: Do the amounts paid by the members of the association, viz: \$10.00 initiation fee and \$10.00 annual dues, amount to "admission to any place" under Section 1700, U. S. C. A., Title 26? Or are they initiation fees and dues, and if so, controlled by Section 1710, U. S. C. A., Title 26?

RESPONSE TO APPELLANTS' ARGUMENT

I.

We shall proceed to answer appellants in the sequence adopted by them, beginning on page 7 of their brief.

Chimney Rock Co. v. United States, 63 C. Cls. 660, 275 U. S. 552, cited by appellants on page 8 of their brief, is not analogous. The toll charge there exacted was for the privilege of gaining admission to the amusement. No club question was involved.

The students activities fee case, *Min.* 5834, 1945 *Cum. Bull.* 446, cited on page 8 of appellants' brief, provides that where schools collect from students an activity fee, in return for which the student receives season books or tickets covering admissions to athletic games or other affairs, the fees paid are subject to tax as admissions. If the fee covers charge for school paper, the charges should be separated.

M. T. 6, 1942—2 *Cum. Bull.* 245, provides that an amount paid by a student of a university for season ticket for athletic or other events, constitutes an amount paid for admission by season ticket.

The *S. T.* 859, 1937—1 *Cum. Bull.* 334, citation of which appears on page 8 of appellants' brief, provides that where a club maintains a swimming pool as one of its facilities and for which the members are charged, that such charge is subject to an admission tax. If in the case at bar the members of the club were to enter a side-show for which a charge is made, the charge so made under the authority of this citation would be subject to an admission charge. There then would be some analogy.

The *S. M. 2853, II*—1 *Cum. Bull.* 294 (1925) cited on page 8 of appellants' brief, has to do with a political gathering. No club question is presented there.

The *Exmoor Country Club v. United States*, 119 F. 2d 961 (C. A. 7th), holds that amounts paid for use of swimming pool, skating rink and for privilege of dining and dancing were taxable as an admission to any place. The appellee also maintained a private golf course and club house. Since the judgment of District Court was for the sum of \$2,874.09, and since the correctness of the judgment as to \$1,426.34 was not in dispute, it is fair to assume that the \$1,426.34 related to dues and initiation charges and in connection with the golf course and club house.

In the case at bar, the Executives Club made no charge for food that was served. Each member who ate, paid for his meal direct to the agency that served it.

The *Twin Falls Natatorium v. United States*, 22 S. 2d 307 (S. D. Ohio), cited on page 8 of appellants' brief, held that charges made to the public for use of pool, dressing rooms, towels and rental of bathing suits, were taxable as an admission to any place.

The *United States v. Koller*, 287 Fed. 418 (W. D. Wash.), cited on page 8 of appellants' brief, held that a charge made to the public by a proprietor for a skating ticket before patron could be permitted to skate, whether they used own skates or not, was taxable as an admission to any place.

We cannot agree that any of the foregoing authorities sustain appellants' stand. Appellants are seeking to extend the tax statute by implication, which cannot be done.

"It is to be remembered that we are here concerned with a taxing act with regard to which the general rule requiring adherence to the letter applies with particular strictness, and that a tax statute should not be extended by implication or enlarged by construction so as to embrace matters not therein specifically pointed out."

Crooks v. Harrelson, 282 U. S. 55;

United States v. Merriam, 263 U. S. 179;

United States v. Field, 255 U. S. 257;

Gold v. Gold, 245 U. S. 151;

Columbia Univ. Club v. Higgins, 23 Fed. Sup. 572.

Any doubt as to whether or not a taxpayer should be subjected to a tax is to be resolved in favor of the taxpayer. On page 9 of appellants' brief, they say that stipulated facts support them, among which is "an additional payment is always made for food and other services furnished at the lecture."

True, an additional charge is made for food, but the charge is made by the hotel in which the meetings are held. Suppose one bought a package of peanuts instead, would that alter the case? The statement of facts makes no reference to other services furnished by the club and could not, as no other services were rendered.

Further on the same page, appellants argue that the usual concomittant features of a club are lacking—no club house, etc.

Because the Butte Executives Club could not afford these features, doesn't militate against its existence as a club. There are Rotary Clubs and many other service clubs, card clubs, and others to which reference is made in the footnote of Section 1710, U. S. C. A., Title 26, that lack the elements to which counsel makes reference.

We believe that the principle announced in the case of *White v. Winchester Club*, 315 U. S. 32, 41, appearing on page 10 of appellants' brief, supports our contention, and that the charges made amount to initiation and dues fees.

On page 11 of appellants' brief, counsel says that benefits consist of seven lectures a year. The record will not support him. Benefits for the first year ending the last day of June 1945, consisted of seven lectures (R. 16, 24). The year in dispute is the second year, viz. July 1, 1945, to July 1, 1946 (R. 17). The number of speakers after the first year was not fixed.

Counsel argues on page 11 of appellants' brief, that Section 1710, U. S. C. A., Title 26, is not involved. We submit that it is and that Congress intended it should govern this situation, and since Butte Executives Club is an educational club (R. 19, 23-24), then for two reasons it should not be taxed, namely: (1) It is not a social, athletic or sporting club; (2) initiation fees do not exceed \$10.00.

Some of the cases cited in the footnote of Section 1710, U. S. C. A., Title 26, and especially note 12, might be authority for classing Butte Executives Club as a social club. We doubt if appellants would make the present stand that Section 1710 has no application if the initiation fees and annual dues fees exceeded the sum of \$10.00, and hence made the Butte Executives Club subject to payment of the tax, assuming, of course, that it would be classified as a social club.

On page 12 of appellants' brief, counsel says that the club charged the members for admittance. The record will not support them. We believe that Article 101.2, Par. 6 of Regulations 43, cited on page 20 of appellants'

brief, is especially applicable. We direct attention to Rule 101.25, Regulations 43, which provides:

“Any organization which maintains quarters or arranges periodical dinners or meetings, for the purpose of affording its members an opportunity of congregating for social intercourse, is a ‘social * * * club or organization’ within the meaning of the Code, unless its social features are not a material purpose of the organization but are subordinate and merely incidental to the active furtherance of a different and predominate purpose, such as, for example, religion, the arts or business.”

We also direct attention to Section 1712 (b), U. S. C. A., Title 26, and Section 101.28 of the Regulations 43, which defines initiation fees as including

“any payment, contribution or loan required as a condition precedent to membership,” etc.

Since the initiation fee of \$10.00 is required to become a member of the Butte Executives Club (Exhibit “B,” R. 23-26), the charge should be treated as initiation fee and not as “admission to any place.”

II.

CLAIM WAS SUFFICIENT

Section 101.42, Regulations 43, cited on page 12 of appellants’ brief, provides that a claim for refund must be filed by the person against whom they were assessed or by whom they were in the first instance erroneously or illegally paid. It further provides that in any case where a club as an agent of its members, seeks a refund of taxes, the claim must be accompanied by powers of attorney of the members, etc.

In the case at bar, no taxes were assessed against the

members of the club. The assessment was made against the club and it was the club that paid them. In this case, the club is not seeking a refund as agent of its members. The club was taxed as an entity. The money was taken from the club. Its only source of revenue was initiation and annual dues. No other money was collected from members either as taxes or otherwise (R. 18). The members had not paid a tax. They had paid initiation and annual dues for which amounts the club planned to procure speakers. The tax was imposed upon the club, and the amount in question was taken from the initiation and dues fund, thereby reducing the number and quality of speakers the club planned to provide.

The *Builders' Club of Chicago v. United States*, 14 F. Supp. 1020, cited on page 13 of appellants' brief, holds that Regulations 101.42 is invalid and that the club is the proper entity to claim and secure a refund.

The *Engineer's Club of Philadelphia v. United States*, 42 F. Supp. 182, cited on page 14 of appellants' brief, did not impose a tax on admission. It held that the club was social and that amounts paid for initiation and annual dues were taxable under Section 1710, U. S. C. A., Title 26.

The *Turks Head Club v. Broderick*, 166 F. 2d 877 (C. A. 1st), cited on page 14 of appellants' brief, had to do with a social club, and in that case, reference is made to Section 101.37 of Regulations 43 (1941), providing that in social, athletic or sporting clubs, the club shall collect the taxes at time of paying initiation and annual dues, and that in the event a member refuses to pay, and upon notice given to the Commissioner, the Commissioner shall make a direct assessment. The Commissioner knew the members had not paid any tax (R. 18, 13). The Commissioner ruled that the club should pay the tax under

Section 1700 (a), U. S. C. A., Title 26, notwithstanding Section 101.37 of Regulations 43 and paragraph 2 of Section 1700 (a), which provide that the tax shall be paid by the person paying for the admission.

The *Turks Head Club v. Broderick*, 166 F. 2d 877 (C. A. 1st), gave no consideration to Rules 17 (b) and 23, Federal Rules of Civil Procedure. Rule 17 (b) provides:

"In all other cases, capacity to sue or be sued, shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it, a substantive right existing under the Constitution or laws of the United States."

Section 101.42 of Regulations 43 (1941) not only attempts to legislate (the *Builders' Club of Chicago v. United States*, 14 F. Supp. 1020), but it attempts to alter the rules governing Federal Courts. If the courts of the nation settle disputes and prescribe rules governing such disputes, certainly a governmental agency cannot impose conditions limiting the right of a court to acquire jurisdiction. The same may be said of Rule 23, Federal Rules, which provides for an action by few in behalf of many in certain instances.

The Commissioner has power to make reasonable regulations. If he has power to make them, he has power to modify, change or cancel them. If he has these powers, he has the power to waive rules. In this instance, Commissioner waived the regulations requiring powers of attorney, etc., by passing on the merits of the claim (R. 28-30). (33 Corpus Juris 349, Sections 229 and 230.)

In the case of *Tucker v. Alexander*, 275 U. S. 228, 72 L. Ed. 253, the Supreme Court said:

“The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of Government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund, and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the Government, and decidedly in the interest of an orderly administrative procedure, that the claim should be disposed of upon its merits, on a first trial without imposing upon Government and taxpayer, the necessity of further legal proceedings. *We can perceive no valid reason why the requirements of the regulation may not be waived for that purpose.*” (Italics ours.)

On page 15 of appellants' brief, he says the obvious purpose of this provision is to protect the government from having to pay twice. The prime purpose of a regulation is to expedite the administration of a law. If it does more than that, it isn't valid. The judicial branch of the government is charged with the responsibility of prescribing the rules which should control judicial proceedings. The judicial branch of the government has adopted the rules 17 (b) and 23, and by these rules it has granted the plaintiffs, Butte Executives Club and the members, Newland, Tullis and Martin, the right to sue, and no governmental agency has the right to qualify or amend these rules.

33 Corpus Juris 286-287, Sec. 32.

CONCLUSION

Did the Congress intend that money paid to a unit such as Butte Executives Club, should be taxed as an "admission to any place?" We contend that it did not, and that a careful consideration of Section 1710, Title 26, U. S. C. A. confirms the stand taken by appellees. Also that the Commissioner of Internal Revenue and Secretary of Treasury did not so intend by reason of the rules and regulations adopted by them and set forth above, and that they intended the payments should be treated as initiation and dues payments.

Respectfully submitted,

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October, 1949

No. 12,271

**In the United States Court of Appeals
for the Ninth Circuit**

LEWIS FRED PENWELL AND SUSANNAH W. PENWELL,
EXECUTOR AND EXECUTRIX OF THE ESTATE OF LEWIS
PENWELL, FORMERLY COLLECTOR OF INTERNAL REVE-
NUE FOR THE DISTRICT OF MONTANA, DECEASED, APPEL-
LANTS

v.

JOHN N. NEWLAND, JAMES TULLIS, GEORGE I. MARTIN,
AND BUTTE EXECUTIVES CLUB, A NONPROFIT UNINCOR-
PORATED ASSOCIATION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA

PETITION OF THE APPELLANTS FOR REHEARING

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FILED

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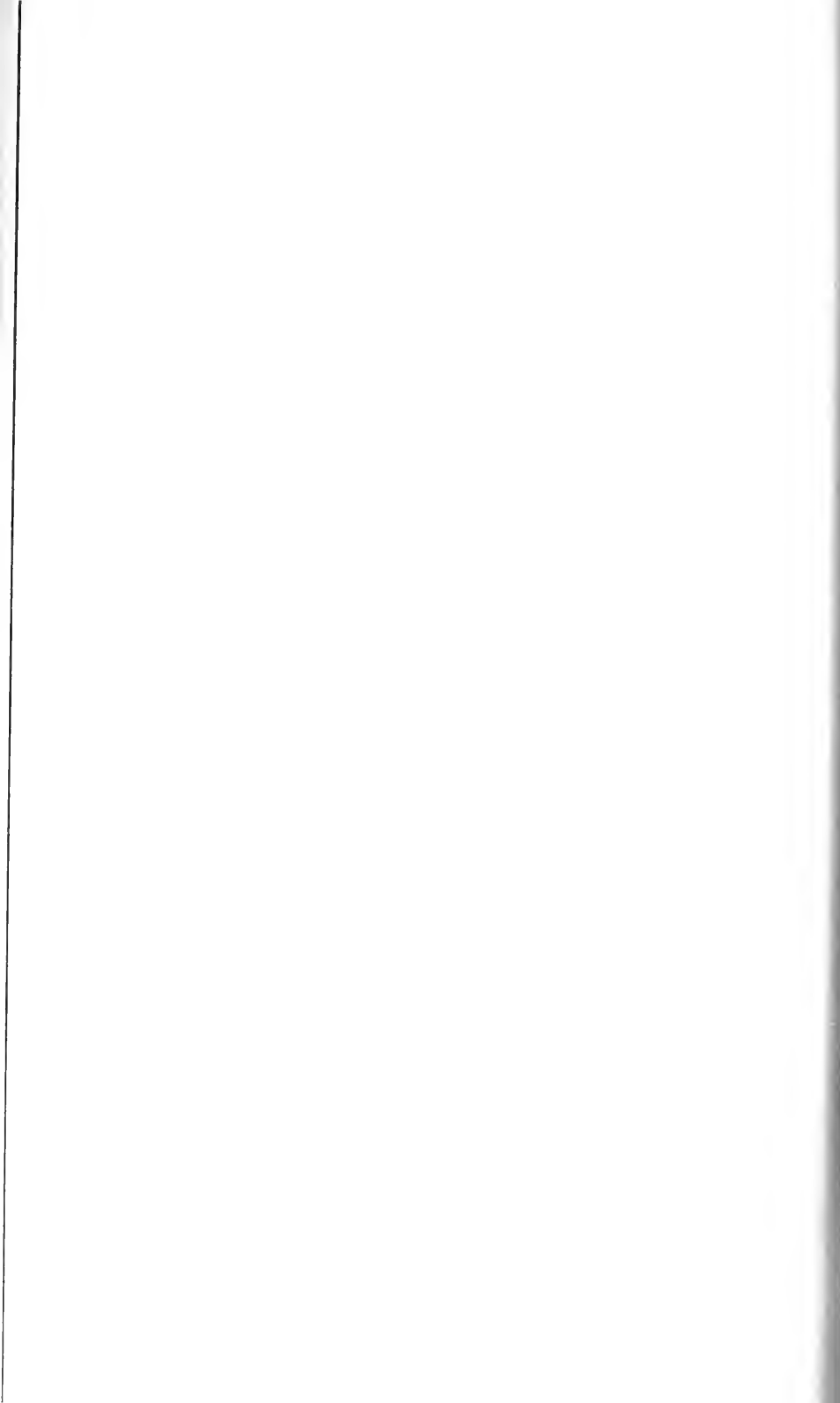
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 12271

LEWIS FRED PENWELL AND SUSANNAH W. PENWELL,
EXECUTOR AND EXECUTRIX OF THE ESTATE OF LEWIS
PENWELL, FORMERLY COLLECTOR OF INTERNAL REVENUE
FOR THE DISTRICT OF MONTANA, DECEASED, APPELLANTS

v.

JOHN N. NEWLAND, JAMES TULLIS, GEORGE I. MARTIN,
AND BUTTE EXECUTIVES CLUB, A NONPROFIT UNINCORPORATED
ASSOCIATION, APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA*

PETITION OF THE APPELLANTS FOR REHEARING

*To the Honorable United States Court of Appeals for
the Ninth Circuit and to the Judges Thereof:*

Come now the appellants, Lewis Fred Penwell and Susannah W. Penwell, and in accordance with Rule 25 of this Court present their petition for rehearing.

On January 19, 1950, this Court dismissed the Government's appeal in this case because of a putative failure to file a valid notice of appeal and vest this Court with jurisdiction. The alleged fatal defect was that the notice of appeal had been taken in the name of the original party defendant, Lewis Penwell, Collector of Internal Revenue, rather than in the names of the sub-

stituted parties defendant, Lewis Fred Penwell and Susannah W. Penwell, against whom the judgment was entered below.

This Court's decision places a construction on Rule 73 of the Federal Rules of Civil Procedure wholly unwarranted by prior decisions and clearly dissonant with the intent and purpose of the Rules. A notice of appeal is to be construed liberally. *Martin v. Clarke*, 105 F. 2d 685 (C. A. 7th); *Title Guaranty & Trust Co. v. Lester*, 216 Cal. 273. Its purpose is merely to advise the opposite party of an appeal from a particular judgment (*Martin v. Clarke, supra*), and if this requirement is met and the parties are not misled, an error which does not go to the fundamental or substantive rights of the parties should be disregarded (*DeSanta v. Nehi Corp.*, 171 F. 2d 696 (C. A. 2d); *Dawson v. McWilliams*, 146 F. 2d 38 (C. A. 5th)). As Justice Douglas said in *Reconstruction Finance Corp. v. Prudence Group*, 311 U. S. 579, 583:

The court has discretion, where the scope of review is not affected, to disregard such an [procedural] irregularity in the interests of substantial justice. * * *

Furthermore, the Courts of Appeals have been admonished by Rule 61 of the Federal Rules of Civil Procedure to disregard harmless error. *Commercial Banking Corp. v. Martel*, 123 F. 2d 846, 847 (C. A. 2d); *University City, Mo. v. Home Fire & Marine Ins. Co.*, 114 F. 2d 288, 295 (C. A. 8th). Consonant with the rationale of these cases and the spirit of the Rules, it has even been held that the failure to file any notice of appeal at all is not fatal, if the fundamental rights of the parties are not prejudiced. *Crump v. Hill*, 104 F. 2d 36 (C. A. 5th). See also *Federal Deposit Ins. Corp. v. Congregation Poiley Tzedek*, 159 F. 2d 163 (C. A. 2d); *In Re Barnett*, 124 F. 2d 1005 (C. A. 2d).

A court should be loathe to deny any party a hearing on the merits merely because of procedural irregularities. The very purpose of the Federal Rules of Civil Procedure as evidenced by the liberal construction given them by the Courts is to do away with rules of procedure as expedients for winning the game of litigation and to seek instead the adjudication of rights on the merits. As Judge Frank said in *In Re Barnett*, *supra* (p. 1011):

* * * there has developed, inter alia, the doctrine of "harmless error", which, to the chagrin of those devoted to a conception of litigation as a game of skill, has led to a marked reduction of reversals based upon procedural errors which do no real harm.

Rule 73 provides for the filing of a notice of appeal, the purpose of which is merely to advise the opposite party of an appeal from a particular judgment. It was never intended that assiduous adherence to the literal and formal dictates of the Rule be required, under penalty of a denial of substantive justice for nonprejudicial error. But such is the result of this Court's decision, for the Government has been denied a hearing on the merits, although the purpose of the notice of appeal has been fully effectuated, i. e., the appellees were fully aware of the judgment from which appeal was taken; they were not misled nor have they been prejudiced in any of their fundamental rights. This is fully borne out by the appellees' failure to challenge the validity of the notice of appeal until after the Government had expended time and money to file a record and brief in this Court. It was not in fact until appellees themselves had filed a brief on the merits that they raised the question of this Court's jurisdiction to hear the controversy.

This is not a case where the appeal was taken in the

name of someone completely foreign to the proceedings below, but rather it was taken in the name of the original party defendant to the suit, a party with whom appellees were familiar. It has been held that the taking of an appeal in the name of an original rather than a substituted party does not render the notice fatally defective. *Bullock v. Electric Supply Co.*, 227 Mo. App. 1010. Moreover, the notice of appeal in all other respects correctly identified the judgment from which appeal was taken. It was signed by the attorneys representing defendants below; it was filed in the court in which the case was tried; and it was served on the attorneys representing plaintiffs below. Cf. *Herrlich v. McDonald*, 72 Cal. 579.

The effect of the decision of this Court is to adjudicate the Government's substantive rights on the basis of a technical procedural defect, despite the fact it was but harmless error. Such a decision is not consonant with the spirit and purpose of the Federal Rules of Civil Procedure. It is in the words of Judge Hutcheson in *Crump v. Hill*, *supra*, p. 38:

* * * a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule [73] is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights.

The penalty exacted by this Court is too great a price to pay for a mere clerical misprision which does not mislead or prejudice, nor deny fundamental rights. Mere harmless error in a notice of appeal which complies with the spirit of the Rules should not be held to deprive a party of the right to be heard on the merits.

WHEREFORE, in view of the foregoing the appellants respectfully pray that their petition for rehearing be

granted and that this Court's order of January 19, 1950, dismissing the Government's appeal be set aside, and that this Court grant a hearing of the case on the merits.

Respectfully submitted,

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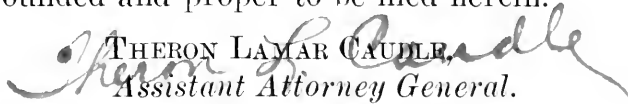
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FEBRUARY, 1950

CERTIFICATE OF COUNSEL

The appellants herein, by their attorneys, hereby certify that the foregoing motion is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well founded and proper to be filed herein.

THERON LAMAR CAUDLE,
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FEBRUARY, 1950

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No. 12,272

IN THE
United States Court of Appeals
For the Ninth Circuit

EARL W. TAYLOR,

VS.

Appellant,

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States
for the Northern District of California.

BRIEF FOR THE UNITED STATES.

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No. 12,272

IN THE

**United States Court of Appeals
For the Ninth Circuit**

EARL W. TAYLOR,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

**On Appeal from the District Court of the United States
for the Northern District of California.**

BRIEF FOR THE UNITED STATES.

OPINION BELOW.

The Court rendered no opinion.

JURISDICTION.

The appellant, Earl W. Taylor, was indicted on February 16, 1949, in the District Court for the Northern District of California, Southern Division, as follows:

Count One—for wilfully and knowingly attempting to evade and defeat his personal income taxes in the amount of \$1,331.70, for the calendar year 1944, in violation of Section 145(b), Internal Revenue Code;

Count Two—for wilfully and knowingly attempting to evade and defeat his personal income taxes in the amount of \$4,550.52, for the calendar year 1945, in violation of Section 145(b), Internal Revenue Code;

Count Three—for wilfully and knowingly attempting to evade and defeat the personal income tax of his wife, Yvette Taylor, in the amount of \$4,550.52, for the calendar year 1945, in violation of Section 145(b), Internal Revenue Code;

Count Four—for wilfully and knowingly attempting to evade and defeat his personal income tax in the amount of \$1,766.59, for the calendar year 1946, in violation of Section 145(b), Internal Revenue Code.

On February 23, 1949, appellant pleaded guilty to Count Two of the indictment before the Honorable Michael J. Roche, Chief United States District Judge, and the other three counts were dismissed. After entry of the plea of guilty, Terence J. Carey, a special agent of the Bureau of Internal Revenue, took the stand and recited certain facts in connection with Taylor's background, whereupon he was cross-examined by Taylor's counsel. The appellant, on March 2, 1949, was sentenced to five years' imprisonment. On March 3, 1949, appellant filed a petition for a writ of habeas corpus alleging insanity of appellant, which petition was denied on March 21, 1949, for failure to comply with Section 2255 of the Judicial Code. (28 U.S.C. Section 2255.) A motion to vacate judgment was subsequently filed and at the hearing thereon, the Court reviewed all prior proceedings of the matter, received the reports of the two psychiatrists

who had been appointed by the Court to examine into the mental condition of the appellant and heard the testimony of one of the psychiatrists with respect to his findings. This appeal is from an order of Judge Roche denying the motion to set aside the judgment rendered on March 2, 1949.

STATEMENT OF QUESTIONS INVOLVED.

1. Was the Honorable Michael J. Roche disqualified to pass upon the motion to vacate judgment and sentence because of personal bias and prejudice?
2. Was the motion to vacate judgment and sentence properly denied in view of appellant's assertion that he was not mentally competent?
3. Was the testimony of a special agent of the Bureau of Internal Revenue properly admitted and considered by the Court after the plea of guilty in determining the length of sentence imposed?
4. Was the imposition of a sentence of five years' imprisonment in conformity with law?
5. Was appellant deprived of any of his constitutional rights in the proceedings herein?

STATUTES INVOLVED.

Title 26, Internal Revenue Code:

Sec. 145. PENALTIES.

* * * * *

(b) Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) Any individual who willfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in section 125 of the Criminal Code.

Title 28, United States Code Judiciary and Judicial Procedure:

Sec. 2255. FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE.

* * * * *

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

* * * * *

STATEMENT.

On February 16, 1949, appellant was indicted and on the same day he was taken into custody by a deputy marshal. The indictment was in four counts under Section 145(b) of the Internal Revenue Code (26 U.S.C. 1940 Ed., Sec. 145(b)). The maximum penalty provided by this section on each count is five years' imprisonment or \$10,000 fine or both. Arraignment of appellant was on February 17, 1949. He appeared in Court with counsel. Upon request of appellant's counsel, the case was continued until February 23, 1949, for plea. (Tr. 4.) On the latter date, appellant appeared with counsel and entered a plea of guilty to Count Two of the indictment, whereupon the other three counts were dismissed. After the entry of the plea of guilty to Count Two and dismissal of the other counts, Terence Carey, a special agent of the Bureau of Internal Revenue, was called to the stand and gave testimony relating to his investigation of appellant's tax liability and his personal history. Special Agent Carey was cross-examined by appellant's counsel. Upon objection by appellant's counsel to certain testimony, the Court stated (Tr. 11):

We are not trying the case; there is a plea of guilty that has been entered here. The plea is now before me. In order to determine punishment, anything that occurred in relation to this defendant is admissible in relation to a report or showing made in court.

Upon completion of the cross-examination of Special Agent Carey, the matter was referred to the Proba-

tion Officer for a report on March 2, 1949, the date set for sentencing of appellant. On the latter date, appellant's counsel made the following representations to the Court, among others (Tr. 18):

The decision of the defendant to plead guilty before the Court to one of the four counts of the indictment was made after serious consultation with me, in the present period. I think he searched his own conscience at that time and asked himself sincerely whether he was guilty of all four of them or whether he was guilty of one. Upon his direction and his own conviction that he was guilty of the one, I have so represented to the Court; that is before your Honor today, and I believe it is the second count.

Since that time I have made various visits to the prison to interview the gentleman and I have had various conferences with the probation officer.

Before passing sentence, the Court inquired of appellant whether there was anything he might wish to say. Appellant replied, "No, your Honor." (Tr. 21.) The Court then imposed a sentence of five years, with \$50 costs of prosecution added.

On the following day appellant filed a petition for a writ of habeas corpus *in pro per*, basing his petition on the ground "that petitioner is now and has been since 1943, legally insane." (Earl W. Taylor, Petitioner v. John A. Roseen, Acting U. S. Marshal, Respondent No. 28,666-G.) The hearing on this petition was before the Honorable Louis E. Goodman

on March 21, 1949. An oral challenge was made to Judge Goodman on the ground of bias and prejudice. The basis alleged for this challenge was a statement attributed to Judge Goodman on July 17, 1945, in the case of *Taylor v. Bowles*, Administrator of the Office of Price Administration, Case No. 24,949-G. Appellant's counsel stated that Judge Goodman had used language in that case substantially as follows: " 'This witness'—meaning Mr. Taylor—'is an arrogant young man who desires to rule the roost.' " (Tr. 25.)

Judge Goodman dismissed the petition for a writ of habeas corpus on the grounds that appellant had not complied with the provisions of Section 2255 of the Judicial Code. (28 U.S.C. Sec. 2255.) Subsequently appellant, by his counsel Lou Ashe, Esq., filed a motion to vacate judgment pursuant to the provisions of Section 2255, in which the allegation was made that appellant was suffering from a mental disorder. Upon a hearing on this motion on April 21, 1949, which came before Judge Roche, the report of Milton B. Lennon, M.D. and P. P. Poliak, M.D., psychiatrists appointed by the Court on April 7, 1949, to examine into appellant's mental condition, was filed. In this report the following conclusion appeared (Tr. 39):

Conclusion. It is our opinion that the defendant is an emotionally unstable, highly neurotic individual and a psychopathic personality. All this constitutes a psychiatric disorder and not of a type rendering the subject mentally incompetent. He is fully cognizant of the nature of his

acts, suffers no delusions or hallucinations, recognizes the difference between right and wrong and is quite capable of appreciating the gravity of the charges against him. It is our further opinion that he was, legally, mentally competent at the time of his guilty plea, at the time of his sentence and for a substantial prior period.

Respectfully submitted,
Milton B. Lennon, M.D.
P. P. Poliak, M.D.

Dr. Poliak took the stand and was cross-examined by Mr. Ashe, counsel for appellant. At the conclusion of this hearing, the Court stated (Tr. 60, 61):

Upon a full consideration of the matter as it now stands submitted, it is ordered that the motion of the defendant, Earl W. Taylor, to vacate the judgment and sentence of this court heretofore rendered, be and it is hereby denied. That is all.

Mr. Ashe asked to be relieved of further representation of Mr. Taylor and appellant then stated, "I would like to file a motion of appeal from this order." (Tr. 61.) A written notice of appeal from the order was filed with the District Court on April 25, 1949, by appellant *in pro per*.

ARGUMENT.**I.****THE SENTENCING JUDGE WAS NOT DISQUALIFIED FROM
HEARING THE MOTION TO VACATE JUDGMENT.**

It should be noted at the outset that the first attempt to challenge the District Judge on the ground of bias and prejudice occurred after sentence was imposed. It should also be noted that the record fails to disclose a single allegation of fact which would suggest personal bias or prejudice on the part of Judge Roche. It was not until after appellant attempted to attack the Court's sentence on a petition for a writ of habeas corpus and later on a motion to vacate judgment, that he made allegations of bias and prejudice.

Section 144 of the Judicial Code (28 U.S.C. Sec. 144), provides as follows:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit as to any judge.

It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

This section is very clear in the requirement that an affidavit shall be filed which states the facts and reasons for the belief that bias or prejudice exists. It provides that such affidavit be filed not less than ten days before the beginning of the term at which the proceeding is to be heard and that such affidavit be accompanied by a certificate of counsel of record stating that it is made in good faith. No such affidavit has been filed in this case nor do any facts appear in the record upon which such an affidavit could be predicated.

Aside from the lack of foundation for such an affidavit and the failure to file it, it is evident that the section has no application in this proceeding to vacate judgment. The challenge of personal bias or prejudice must be made to a judge before sentence is passed. Were this not so, a defendant could take his chances with a judge and if the sentence seemed severe, he could attempt to have a disqualification and a hearing before another judge. In *United States v. 16,000 Acres of Land*, 49 F. Supp. 645, it was clearly brought out that the provision of the statute should be strictly construed. The Court there said:

Strict and full compliance with these provisions of the statutes is required. *Scott v. Beams*, 10 Cir., 122 F. (2d) 777, 778; *Cuddy v. Otis*, 8 Cir., 33 F. (2d) 577.

The purpose of the statutory provision in reference to the requirement of a certificate of coun-

sel of record is well set out in *Newman v. Zerbst*, 10 Cir., 83 F. (2d) 973, 974, where the court said:

"The affidavit did not 'state the facts and the reasons for the belief' of the existence of such bias or prejudice, and was not accompanied by a certificate of counsel of record that the affidavit and application were made in good faith as required by the statute. Moreover, counsel for petitioner in open court stated he could not make such a certificate. * * *

"It is a precaution against abuse, removes the averments and belief from the irresponsibility of unsupported opinion, and adds to the certificate of counsel the supplementary aid of the penalties attached to perjury."

In *United States v. Costea*, 52 F. Supp. 3, 4, the Court states with respect to the filing of an affidavit of prejudice after sentence:

* * * It was conceded by counsel at the time of sentencing that the defendant was clearly guilty of the offense charged, and that the only purpose in filing this document was the defendant's opinion that some other judge might impose a lighter sentence. This statute is not for the accomplishment of such a purpose, nor has any Judge the right to evade his official duty by voluntarily withdrawing at the request of a defendant. This statute provides for the filing of an affidavit before hearing, and has no application after a plea of guilty has been entered.

In *Ex parte American Steel Barrel Company*, 230 U.S. 35, 33 S. Ct. 1007, 1010, the Supreme Court has

the following to say with respect to the application of this provision:

The basis of the disqualification is that "personal bias or prejudice" exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which the affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term.

It is manifestly clear that Judge Roche had no choice but to deny the motion to vacate judgment on the ground of personal bias and prejudice since no facts had been presented suggesting any bias or prejudice. Even if there had been facts and reasons for the belief on appellant's part that personal bias or prejudice existed, such facts and reasons should have been presented before appellant stood before the Court for judgment.

II.

**APPELLANT WAS MENTALLY COMPETENT AT THE TIME
HE ENTERED HIS PLEA OF GUILTY.**

Appellant alleges that he was not of sound mind at the time he entered a plea of guilty to count two of the indictment. On the motion to vacate judgment, Judge Roche gave careful consideration to this issue.

In the Federal Courts two tests are generally applied when present insanity is claimed: (1) was the defendant capable of understanding the nature of the proceedings, and (2) could he rationally advise with his counsel in preparing his defense. *Youtsey v. United States* (C.C.A. 6th), 97 Fed. 937. The form of procedure in making its determination is within the discretion of the Court. Four methods have been generally employed:

(1) Committal of the defendant to an institution for observation and report;

(2) Appointment of a commission or a psychiatrist to examine the defendant and make a report;

(3) Calling in the assistance of a jury; and

(4) Conduct of the inquiry by the judge alone. *United States v. Chisholm* (C.C. S.D. Ala.), 149 Fed. 284; *Whitney v. Zerbst* (C.C.A. 10th), 62 F. (2d) 970; *United States v. Harriman* (D.C. S.D. N.Y.), 4 F. Supp. 186.

In this case Judge Roche appointed two psychiatrists who made a report on the mental condition of appellant. One of these took the stand and was sub-

jected to cross-examination by appellant's counsel. In addition to the assistance of the psychiatrists, Judge Roche had available the reports of the probation officers attached to the District Court. Appellant on September 12, 1948, had completed a five-year probation period on a sentence under a plea of guilty to a Federal offense (Tr. 9), so was well known to the probation office. Judge Roche also had had the opportunity of observing appellant in the courtroom. It is evident from what appellant's counsel stated at the time of sentence that he considered appellant rational and capable of understanding the nature of the proceedings and the consequences of a plea of guilty. Counsel said (Tr. 18):

Mr. Ashe. The decision of the defendant to plead guilty before the Court to one of the four counts of the indictment was made after serious consultation with me, in the present period. I think he searched his own conscience at that time and asked himself sincerely whether he was guilty of all four of them or whether he was guilty of one. Upon his direction and his own conviction that he was guilty of the one, I have so represented to the Court; that is before your Honor today, and I believe it is the second count.

Since that time I have made various visits to the prison to interview the gentleman and I have had various conferences with the probation officer.

Appellant's counsel has not contended that his client was legally insane or incapable of understanding the consequences of his acts. In any event that matter was

set at rest by the report of the psychiatrists who reached the following diagnosis:

Conclusion. It is our opinion that the defendant is an emotionally unstable, highly neurotic individual and a psychopathic personality. All this constitutes a psychiatric disorder and not a type rendering the subject mentally incompetent. He is fully cognizant of the nature of his acts, suffers no delusions or hallucinations, recognizes the difference between right and wrong and is quite capable of appreciating the gravity of the charges against him. It is our further opinion that he was, legally, mentally competent at the *time* ^{ad the} time of his sentence and for a substantial prior period.

Respectfully submitted,

Milton B. Lennon, M.D.

P. P. Poliak, M.D.

Appellant urges that the findings of the psychiatrists were based on false testimony. (Br. 8.) He states that the doctors' report is based partially on the finding that a Wasserman test was taken in September, 1947 and found to be negative. He concludes that this must be false because he asserts he has had a Wasserman taken at McNeil Island in 1949, which was found to be positive. He also states that Public Health records at San Francisco will show that he had a Wasserman test in 1941 which was shown to be positive. It would, of course, be possible for a person to have a positive Wasserman in 1941, a negative Wasserman in 1947 and a positive Wasserman again in 1949. Irrespective of what the true facts are with

regard to the Wasserman tests this matter was explored by appellant's counsel on cross-examination of Dr. Poliak insofar as it related to appellant's mental condition. (Tr. 40-41.)

Cross-examination.

Mr. Ashe. Q. Mr. Poliak, in connection with any claim of venereal disease, you did not presently, during this examination, give him another Wasserman test, did you sir?

A. No, I did not.

Q. Then we cannot say with certainty that he is not at the present time suffering from some venereal disease until we would make some examination, is that correct, Doctor?

A. That's correct.

Q. Was there any reason why another examination was not made while he was being examined by you and the other gentleman?

A. I was not authorized to make any laboratory or physical examinations.

Q. I see. Did you feel that upon the history that such a matter was indicated?

A. No, I did not.

Q. There were no symptoms that you could find which were visible to the eye which would lead you to suspect the possibility of a second outbreak of any type of venereal disease?

A. No, there were none.

Q. But you would, would you not, Doctor, if you were so authorized, have made such an examination?

A. Well, if I were specifically requested; but I didn't feel it was necessary in this particular situation.

Q. Then it remains that the only Wasserman that we know was taken was so many years ago, at which time it was pointed out it was negative; correct, Doctor?

A. Yes.

It appears from Dr. Poliak's testimony that the presence or absence of venereal disease was not relevant to his determination of the question of sanity of the appellant.

A careful reading of the record will disclose that Judge Roche exercised scrupulous care in reaching his determination that appellant was sane. His decision was embodied in the following order:

WHEREAS, the defendant, by and through his counsel, did suggest and nominate P. P. Poliak, M.D., and the United States Attorney did suggest and nominate Milton B. Lennon, M.D.,; that thereupon the Court did appoint both of said doctors and did direct that the said psychiatric examination be made and that said physicians report their findings to this Court on April 21, 1949; and

WHEREAS, the Court did on said 7th day of April, 1949, deny that portion of the motion to vacate with relation to the alleged bias and prejudice of this Court; and

WHEREAS, on this the 21st day of April, 1949, the said doctors have filed their written report with this Court in which they jointly find and state as their professional opinions that the said defendant was at the time of their examination, and at the time he entered his plea of guilty

herein, and at the time of the judgment and sentence herein, and for a substantial period prior thereto mentally competent in that he knew and understood the difference between right and wrong and knew and understood the consequences of his acts in the premises; and

WHEREAS, on said date of April 21, 1949, a hearing on said motion to vacate with relation to the sanity of the defendant was had and evidence was introduced, including the report of the physicians aforesaid, and made a part of the record in the above-entitled case; and

WHEREAS, it is the opinion and finding of this Court that the said defendant, Earl W. Taylor, at the time of the entry of his plea of guilty to Count Two of the indictment herein, at the time of the judgment and sentence herein, at the time of the hearings, heretofore referred to, and for a substantial period prior thereto, was and is legally sane and mentally competent in that he knew and understood the difference between right and wrong, knew and understood the nature and consequences of his acts, and was competent to advise with counsel; and

WHEREAS, the Court is fully advised in the premises, and good cause therefore appearing:

IT IS ORDERED that the motion of the defendant, Earl W. Taylor, to vacate the judgment and sentence of this Court heretofore rendered be and it is hereby denied.

Dated: April 21, 1949.

Michael J. Roche
Chief United States District Judge.

The District Court having reached its conclusion after careful deliberation that finding should not be disturbed on appeal in the absence of a clear showing of abuse of discretion and as stated in a recent article on this subject: “* * * appellate tribunals are generally reluctant to find an abuse of that discretion.” Pollak, *Insanity as a Bar to Prosecution in the Federal Courts*. 7 *Federal Bar Journal* 55 (1945-46).

In this case Judge Roche gave the fullest consideration to the claim of insanity and the record discloses no serious basis for doubting appellant's sanity.

III.

TESTIMONY OF A SPECIAL AGENT OF THE BUREAU OF INTERNAL REVENUE WAS PROPERLY ADMITTED TO ASSIST THE COURT IN DETERMINING THE AMOUNT OF PUNISHMENT.

In the supplemental brief filed by appellant's counsel, the position is taken that error was committed by Judge Roche in admitting the testimony of Terence Carey, a special agent of the Bureau of Internal Revenue. The only authority cited by appellant which appears to be directly in point is *Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252. However, the facts in that case are readily distinguishable from those in the case at bar. The primary ground of reversal by the Supreme Court in the *Townsend* case was the failure to advise *Townsend* of his right to counsel or to offer to assign counsel. As the Court states (p. 1255):

The trial court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding when we learn from the record that actually the charge of receiving the stolen saxophone had been dismissed and the prisoner discharged by the magistrate. But it savors of foul play or of carelessness when we find from the record that, on two other of the charges which the court recited against the defendant, he had also been found not guilty. Both the 1933 charge of larceny of an automobile, and the 1938 charge of entry to steal and larceny, resulted in his discharge after he was adjudged not guilty. We are not at liberty to assume that items given such emphasis by the sentencing Court, did not influence the sentence which the prisoner is now serving.

We believe that on the record before us, it is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the Court or was prejudiced but the Court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the Court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted. * * *

We would make clear that we are not reaching this result because of petitioner's allegation that his sentence was unduly severe. The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state Court's denial of habeas corpus. * * *

* * * * *

In this case, counsel might not have changed the sentence, but he could have taken steps to see

that the conviction and sentence were not predicated or misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner.

In that case not only was the defendant unrepresented by counsel, but it appeared from the record that the sentencing judge had drawn certain unwarranted conclusions with respect to defendant's prior criminal history.

In the instant case the record shows that the special agent who had investigated the income tax affairs of appellant gave a recital of certain facts which not only referred to the taxable year covered by the Court to which a plea of guilty was entered but also gave testimony relating to other taxable years. The testimony of the special agent shows that the operators of a certain bar who had retained appellant as tax counsel had paid money over to Taylor in 1946 which had never reached the Bureau of Internal Revenue. (Tr. 11.) Counsel for appellant had ample opportunity to cross-examine with respect to this particular transaction and the Court made it clear that this testimony was being considered not in relation to the indictment but for the purpose of assisting it in imposing sentence. (Tr. 13.)

Rule 32 of the Federal Rules of Criminal Procedure (18 U.S.C., following Section 687), provides that the report of the presentence investigation shall contain any prior criminal record of the defendant and such other information as the Court may require:

Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and *such other information* as may be required by the Court. (Emphasis supplied.)

It is evident that the Court has wide discretion regarding the matters it may take into consideration in determining the sentence to be imposed. The record contains no indication whatever of unfairness in this regard. The special agent gave his testimony in open Court and was subjected to cross-examination. It has not been claimed nor does the record disclose that any statement he made was false. The mere assertion by the special agent that certain transactions occurred does not necessarily constitute an accusation of the commission of a crime. Such testimony was clearly a proper matter for the Court to consider in measuring the sentence, but even if the extreme view were taken that the evidence was improperly received, the presumption should be applied that the Court disregarded such incompetent evidence. See, *Seber v. Thomas*, 108 F. (2d) 856; *United States v. 6.87 Acres of Land*, 147 F. (2d) 351. It should be noted that the testimony of the special agent was taken on February 23, 1949, and an adjournment was taken at the request of appellant's counsel for one week for submission of a presentence report. (Tr. 17):

Mr. Ashe. May I address the Court: I would like to have this matter continued subject to your Honor's convenience and the calendar until perhaps tomorrow or the next day for the purpose of your Honor's sentence.

The Court. I may indicate to you that it would take a few days for—how many days, Mr. Probation Officer?

The Probation Officer. May we have until March 2nd, your Honor? That is one week.

The Court. Is that agreeable?

Mr. Ashe. Whatever is convenient to your Honor. We would like to expedite it if possible.

The Court. That will give you a full opportunity to make any showing you wish on behalf of your client. My duty seems clear. If he wants to be sentenced this morning I would have no hesitancy in sentencing him on the charge. One week. * * *

When appellant was sentenced on March 2, 1949, Judge Roche had before him not only the testimony of the special agent but the reports of two psychiatrists and those of the Probation Office. As the record shows (Tr. 9), appellant was discharged from five years' probation in the Federal District Court on September 13, 1948. The Probation Office, therefore, had before it not only the report of the special agent and the psychiatrists but its own records of the appellant's activities for the five years just expired, during which time Taylor was under the supervision of that office.

The question of the type of evidence which a Court might properly hear in determining the sentence was

considered in *Stephan v. United States*, (C.C.A. 6th), 133 F. (2d) 87, certiorari denied, 63 S.Ct. 858. In that case appellant was convicted of treason and sentenced to death by hanging. In affirming the judgment of the District Court, the Sixth Circuit had this to say with respect to presentence procedure:

* * * To aid it in the discharge of its duty and in order that the Court might feel certain that the sentence to be imposed was a just and proper one, the Judge on one occasion at the request of appellant's wife, had an interview with her. On another occasion he had an interview with the appellant, his wife and a friend. On these occasions the interviews took such direction as the appellant and his wife desired. In addition to these interviews the Judge had other conversations with representatives of the Federal Bureau of Investigation and the Chief Probation Officer as well as with counsel for appellant and the United States Attorneys who prosecuted the case.

The record indicates that these various interviews took place in the Chambers of the Judge. The information thus made available is set forth in great length in connection with the sentence. Appellant insists that this procedure was improper. We take judicial notice that the practice of presentence investigations has long been followed in District Courts. See *Tractenberg v. United States*, 53 App. D.C. 396, 293 F. 476, 480; *Stobble v. United States*, 7 Cir., 91 F. (2d) 69, 71; *Sharp v. United States*, 4 Cir., 55 F. (2d) 227. See also Title 18, Ch. 22, Sec. 727, U.S.C.A., which makes it the duty of a probation officer to investigate any case referred to him for investigation

by the Court and his further duty to perform such other duties as the Court may direct. The Rules of Practice and Procedure in Criminal Cases, *supra*, 292 U.S. page 661, 54 S.Ct. XXXVII, under the heading "I. Sentence" also clearly recognize not only the propriety but the importance of such investigation. We think, however, that such information should have been disclosed to the Judge in open Court and in the presence of appellant. Such appears to have been the practice in the cases cited. We think that the interest of convicted persons, about to be sentenced is more carefully safeguarded by open hearings under such rules as the Court may adopt. * * *

As appears from the opinion, the sentence was there upheld on appeal even though the sentencing judge had interviews with representatives of the Federal Bureau of Investigation and the Chief Probation Officer in chambers. In the case at bar all proceedings were had in open Court and appellant was represented by counsel at every stage of the proceedings.

IV.

IT WAS NOT AN ABUSE OF DISCRETION FOR THE COURT TO GIVE THE MAXIMUM SENTENCE PROVIDED BY STATUTE.

Appellant was under indictment for attempting to defeat and evade income taxes in violation of Section 145(b) of the Internal Revenue Code. The indictment was in four counts. The maximum penalty which could be imposed under this statute on each count was

five years' imprisonment or \$10,000 fine or both. Upon a trial of the cause, if appellant had been found guilty on all counts, he could legally have been sentenced to twenty years' imprisonment and fined \$40,000. Appellant not only was represented by competent counsel but for several years prior to his indictment had publicly held himself out as an authority on tax law. In entering his plea of guilty, he was undoubtedly conscious of the severe penalty which might be imposed if he stood trial and was convicted on all counts. The real complaint which appellant now seems to have is that he took a chance on a plea of guilty to one count and fared worse on the sentence than he had anticipated. He makes certain comparisons in his brief between the sentence he received and several other sentences meted out in other tax cases. As the record shows, appellant was not only a "tax counselor" who advised many taxpayers with respect to their tax responsibilities to the Government, but he was a twice convicted felon and had been under five years' probation during the period covered by the four counts of the indictment. (Tr. 9.) These matters quite properly were considered by Judge Roche in passing sentence.

It is too well settled to require the citation of authority that Appellate Courts will not disturb a sentence which is within the maximum permitted by statute. It may be appropriate, however, to note that an argument similar to the one presented here was advanced in *Rose v. United States*, 128 F. (2d) 622, (C.C.A. 10th) certiorari denied, 317 U. S. 651. In

that case the indictment was in two counts for violation of Section 145(b) of the Internal Revenue Code. Appellant was found guilty on both counts and sentenced to a term of five years on each count with provision that the two sentences should run consecutively. The opinion of the Court is very explicit on the point here involved:

The final contention which merits brief notice is that the punishment imposed was unusual, harsh and cruel, and not justified or sustained by the purported facts adduced at the trial. Each count in the indictment charged a separate offense under 26 U.S.C.A. Int. Rev. Code § 145(b); and the maximum penalty fixed by the statute for each offense is a fine of not more than \$10,000, or imprisonment for not more than five years, or both. The fixing of penalties for criminal offenses is a legislative function, and ordinarily a sentence within the limits of the applicable statute will not be disturbed on appeal for being unusual, excessive, or cruel. *Schultz v. Zerbst*, 10 Cir., 73 F. (2d) 668; *Reavis v. United States*, 10 Cir., 106 F. (2d) 982; *Moore v. Aberhold*, 10 Cir., 108 F. (2d) 729; *McCleary v. Hudspeth*, 10 Cir., 124 F. (2d) 445.

Appellant was undoubtedly disappointed in the sentence he received and he is correct in his statement that lighter penalties have been imposed on other tax evaders in some cases. But the penalty has been established by the legislature, and the Court, in its discretion, imposed a sentence coming within the statutory maximum. It was appropriate, indeed imperative, that the Court consider the past criminal record

mary purpose of an indictment is to inform the defendant of the offense with which he is charged so as to enable him properly to prepare his defense. The Rules of Criminal Procedure are specific in regard to the use of citations of statutes under which the indictment is brought.

Rule 7(c) provides, in part, as follows (18 U.S.C. following Sec. 687):

* * * Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if error or omission did not mislead the defendant to his prejudice.

The indictment charged appellant with attempted tax evasion. He was adequately informed of the alleged violation and even if the citation had been omitted or erroneously designated he would have suffered no prejudice thereby. In any event, the Code made no changes in the law. The Senate Committee noted in its report, S. Rep. No. 20, 76th Cong., 1st. Sess. (1939-2 Cum. Bull. 535):

This Code contains all the law of a general and permanent character relating exclusively to internal revenue in force on January 2, 1939. In addition, it contains the internal revenue law relating to temporary taxes, the occasion for which arises after the enactment of the Code. The following should be noted in connection with the general character of the Code:

First. It makes no changes in existing law.

The section under which appellant was indicted had been part of the law many years before it was incorporated in the Internal Revenue Code. The indictment was properly brought under Section 145(b) of the Internal Revenue Code and appellant was fully informed of the charges against him.

C.

Section 145(b) has no relation to the penalty prescribed for perjury.

Appellant concedes "that he might be charged with perjury under the Section 145(b). But such a charge is not made in the indictment." (Tr. 15.) He apparently concludes that an indictment under Section 145(b) is void because of the confusion of tax evasion with perjury.

The indictment in this case was brought under Section 145(b) of the Internal Revenue Code. Appellant has confused Section 145(c) (26 U.S.C. 1940 Ed., Sec. 145(c)) with Section 145(b). Section 145(c) provides as follows:

Any individual who wilfully makes and subscribes a return which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be subject to the penalties prescribed for perjury in Section 125 of the Criminal Code.

This section has no relation to Section 145(b) under which this indictment was brought. Consequently, there is no merit in appellant's argument in this regard.

D.

There has been no violation of any constitutional provisions.

In his brief, appellant has complained of several violations of his constitutional rights. Among these is the allegation that his books were seized without a search warrant. He also states that after an alleged unlawful seizure had been made and a lien placed against his assets, "defendant appeared before these said agents on many occasions during the year 1947 and the year of 1948 and cooperated with them to the best of appellant's ability." (Br. 23.) It is clear that the Collector of Internal Revenue and the Commissioner of Internal Revenue have authority under Sections 3614 and 3615 of the Internal Revenue Code (26 U.S.C. 1940 Ed., Sec. 3614, 3615) to make proper examination of the books and records of a taxpayer without first obtaining a search warrant. There is no evidence in the record nor has any evidence been advanced subsequent to the proceedings in the District Court to show any unlawful act on the part of the Government agents. In fact the above-quoted portion of appellant's brief indicates that he voluntarily supplied information to the Government agents during their examination into his income tax affairs.

Appellant has advanced other contentions which are totally without merit. The real substance of appellant's complaint has been summed up in his brief on page 24, where he states:

Appellant did plead guilty, relying upon the advice of Counsel that he would receive some consideration from the Court because of his plea of

guilty. Appellant received no consideration from the Court.

Appellant took his chances under four counts of an indictment under which he could have received a maximum sentence of twenty years' imprisonment. He was given the maximum sentence on the one count to which he pleaded guilty. No substantial reason has been given by appellant for disturbing the action of the District Court in imposing a five-year sentence which was fully justified under the particular facts and circumstances disclosed to the Court prior to the imposition of sentence.

CONCLUSION.

In view of the foregoing, the denial of the motion to vacate judgment and sentence should be affirmed.

Dated, San Francisco, California,
September 23, 1949.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

ROBERT B. McMILLAN,

Assistant United States Attorney,

ERNEST R. MORTENSON,

Special Attorney, Bureau of Internal Revenue,

Attorneys for Appellee.



12273

United States
Court of Appeals
For the Ninth Circuit.

SOUTHERN CALIFORNIA RETAIL DRUG-
GISTS ASSOCIATION, LTD., a non-profit
corporation, etc., et al.,

Appellants,

vs.

RETAIL CLERKS UNION, LOCAL NO. 770, an
unincorporated association, etc., et al.,

Appellees.

Transcript of Record

Upon Appeal from the United States District Court
for the Southern District of California
Central Division.

So. Calif. Ret. Druggists, etc., et al.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Los Angeles 13, Calif.

For Appellees: Retail Clerks Union, Local No. 770
et al:

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415 Subway Terminal Bldg.,
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Los Angeles 13, Calif.

For Appellees: Retail Clerks Union No. 324 et al:

ROBERT W. GILBERT,
LOUIS A. NISSEN,
117 W. 9th St.,
Los Angeles 15, Calif. [1*]

* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the United States District Court, Southern
District of California, Central Division

No. 9098—BH

SOUTHERN CALIFORNIA RETAIL DRUG-
GISTS ASSOCIATION, LTD., a Nonprofit
Corporation, Individually and as Representa-
tive of Its Members; RALPH P. CANEER
and JOHN C. PEARSON, Individually and as
Partners Doing Business as (Caneer and Pear-
son Drug Co.); J. DONALD OWENS and
MARSHALL MALLOY, Individually and as
Partners Doing Business as (Owens and Mal-
loy Prescription Pharmacy); RALPH P. CA-
NEER, JOHN C. PEARSON, J. DONALD
OWENS and MARSHALL MALLOY, as Rep-
resentatives of Other Employers Similarly Sit-
uated; GEORGE J. GINGRAS and PETE
NEGRETE, Registered Pharmacists, Individ-
ually and as Representatives of Other Phar-
macists Similarly Situated; JAMES A. BEN-
NETT and CHARLES G. WEIR, Student
Pharmacists, Individually and as Representa-
tives of Other Student Pharmacists Similarly
Situated,

Plaintiffs,

vs.

RETAIL CLERKS UNION, LOCAL No. 770, an
Unincorporated Association, and JOSEPH T.
DeSILVA, Individually and as Secretary of

Said Organization; RETAIL CLERKS UNION, LOCAL No. 324, an Unincorporated Association, and RICHARD L. JOHNSTON, Individually and as Secretary of Said Organization; FOOD AND DRUG COUNCIL OF LOS ANGELES AND VICINITY, an Unincorporated Association; THOMAS PITTS, Individually and as President of Said Organization, and JOSEPH T. DeSILVA, Individually and as Secretary of Said Organization;

DOE ONE TO DOE TWO HUNDRED (Inclusive of All Intervening Numbers as Though Each Said Doe was Severally and Separately Designated); [2]

DOE ONE CORPORATION TO DOE ONE HUNDRED CORPORATION (Inclusive of All Intervening Numbers as Though Each Said Corporation Was Severally and Separately Designated);

DOE ONE PARTNERSHIP TO DOE ONE HUNDRED PARTNERSHIP (Inclusive of All Intervening Numbers as Though Each Said Partnership Was Separately and Severally Designated);

DOE ONE ASSOCIATION TO DOE ONE HUNDRED ASSOCIATION (Inclusive of All Intervening Numbers as Though each said Association Was Separately and Severally Designated),

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs allege that:

I.

This suit is brought under the Federal Declaratory Judgment Act of June 14, 1934 (28 U.S.C. 400), on a claim and an actual controversy arising under a law regulating commerce, to wit: the Labor Management Relations Act, 1947 (29 U.S.C. Section 141 et seq.), and the above-entitled Court has jurisdiction under 28 U.S.C. Section 41 (8) and the matter in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand dollars (\$3,000.00), so that the above-entitled Court has jurisdiction under 28 U.S.C., Section 41(1) and the Court has power to declare the rights and legal relations of the parties interested, and said parties are entitled to such declaration, the same to have the force and effect of a final judgment or decree, and to be reviewable as such.

II.

The plaintiff, Southern California Retail Druggists Association, Ltd., is a nonprofit corporation, organized and [3] existing under the laws of the State of California, composed of approximately 1120 members who are retail druggists and own retail drug stores in Southern California.

III.

Plaintiffs Ralph P. Caneer and John C. Pearson, are partners doing business as Caneer and Pearson

Drug Co. in the City of Long Beach, and plaintiffs J. Donald Owens and Marshall Malloy are partners doing business as Owens and Malloy Prescription Pharmacy in the City of Los Angeles, and are members of plaintiff Southern California Retail Druggists Association, Ltd., hereinafter referred to as Druggists Association. All of said plaintiffs bring this complaint on their own behalf and on behalf of all other members of said Druggists Association who are within the jurisdiction, geographically and otherwise, of the defendant Retail Clerks Union, Local No. 770, or Retail Clerks Union, Local No. 324, and on behalf of all other drug store owners who are within said jurisdiction of either of the defendant local unions and who may hereafter join in the prosecution of this suit; that all of said members and other drug store owners who may join are too numerous to be joined as parties plaintiff; that the questions to be determined herein are of common and general interest to the many persons constituting such class, all of said class being similarly situated.

IV.

Plaintiffs George J. Gingras and Pete Negrete are [4] pharmacist employees in Abrams' Drug Company and Exclusive Prescription Pharmacy, respectively, and plaintiffs James A. Bennett and Charles G. Weir are student pharmacists employees in Exclusive Prescription Pharmacy, which drug stores are members of said Druggists Association and are located within said jurisdiction of defend-

ant local unions and bring this action on behalf of themselves and on behalf of all other pharmacists and student pharmacists similarly situated who are employed in drug stores that are members of said Druggists Association within the said jurisdiction of defendant local unions and on behalf of all other pharmacists and student pharmacists in said jurisdiction who are similarly situated and may hereafter join in the prosecution of this suit; that the questions to be determined herein are of common and general interest to the many persons constituting such class, all of said class being similarly situated.

V.

Defendants Doe One to Doe Two Hundred (inclusive) and each of them, now are, and at all times herein mentioned have been parties to the unlawful activities, combinations and agreements hereinafter mentioned.

Defendants Doe One Corporation to Doe One Hundred Corporation (inclusive) are, and each of them is, and at all times hereinafter mentioned have been parties to the unlawful activities, combinations and agreements hereinafter mentioned.

Defendants Doe One Partnership to Doe One Hundred Partnership (inclusive) are, and each of them is, and at all times hereinafter mentioned have been parties to the unlawful activities, combinations and agreements hereinafter mentioned.

Defendants Doe One Association to Doe One Hundred Association (inclusive) are, and each of them

is, and at all times hereinafter mentioned have been parties to the unlawful activities, combinations and agreements hereinafter mentioned. [5]

VI.

Plaintiffs are informed and believe, and upon such information and belief allege, that defendants Doe One to Doe Two Hundred, Doe One Corporation to Doe One Hundred Corporation, Doe One Partnership to Doe One Hundred Partnership and Doe One Association to Doe One Hundred Association (all inclusive) are, and at all times mentioned in this complaint have been acting in concert with the specifically named defendants with respect to the acts and matters hereinafter mentioned and with respect to the unlawful activities, combinations and agreements hereinafter mentioned.

VII.

Defendants Doe One to Doe Two Hundred, Doe One Corporation to Doe One Hundred Corporation, Doe One Partnership to Doe One Hundred Partnership, and Doe One Association to Doe One Hundred Association are fictitious names; said persons, corporations, partnerships and associations are designated herein by such fictitious names because their true names are to the plaintiffs unknown, and plaintiffs will ask leave to substitute their true names by amendment to this complaint as soon as their true names become known.

VIII.

Defendants Retail Clerks Union Local #770 and

Retail Clerks Union Local #324, Food and Drug Council of Los Angeles and Vicinity and Doe One Association to Doe One Hundred Association, inclusive, were at all times herein mentioned and now are unincorporated associations functioning as labor organizations, each having its principal place of business in the County of Los Angeles, State of California, and associated with one other and with the American Federation of Labor. Said unincorporated associations are hereinafter, for convenience, sometimes referred to as the defendant local unions. [6]

IX.

The defendant union officers are sued herein individually and in their respective official capacities and as representatives of the members of the defendant local unions and union councils. All of the members of defendant local unions and union councils have not been made defendants herein because by reason of their number it would be impractical to bring them all before the Court, but the causes of action set forth herein are of common and general interest to each and all of said members.

X.

That the plaintiff employers and all of said drug store proprietors purchase 75% to 100% of their drugs, patent medicines, etc., out of the State of California for the purposes of resale in this State and substantial quantities of other articles are purchased from out of the State and sold at retail

in this State; that the plaintiff Southern California Retail Druggists Association represent the members of its association, all of such members purchasing 75% to 100% of its drugs and patent medicines out of the State of California, as well as large quantities of other merchandise for purposes of resale in this State; that the plaintiffs George J. Gingras and Pete Negrete, and other pharmacists represented in this action, are pharmacists employed in drug stores purchasing 75% to 100% of its drugs and patent medicines out of the State of California, as well as large quantities of other merchandise; that all of said drug stores are engaged in activities which affect interstate commerce within the meaning of the National Labor Relations Act and Labor Management Relations Act of 1947.

XI.

That representatives of the defendant local unions have stated to the named plaintiff employers and to various other plaintiff employers, and plaintiffs believe, and upon such information and belief allege, that such statements and proposals will in [7] the near future be directed toward other employers who are plaintiffs in this action: that said defendant union Local No. 324 desires to be the sole and exclusive representative of the employees of those of said plaintiffs whose place of business is located in or about the City of Long Beach, and said union Local No. 770 desires to be the sole and exclusive representative of the employees of those of said

plaintiffs whose place of business is located in or around the City of Los Angeles, and said defendant unions have requested plaintiffs to sign a contract, the terms of which provide that plaintiffs shall employ only members of the one of said local unions representing said employees and that all of the employees of plaintiffs, including the registered pharmacists and student pharmacists be members of one or the other of said local unions.

XII.

That the representatives of the defendant local unions maintained and still maintain that for the purposes of collective bargaining, the pharmacists do not constitute a separate class; that the pharmacists are not professional employees within the meaning of the Labor Management Relations Act, 1947, Sec. 2 (12) and Sec. 9(b) (29 USC, Sec. 152(12) and Sec. 159(b)); the defendants have classified pharmacists as being nonprofessional employees for purposes of said contract; that said defendants refuse to concede that the pharmacists have a right to maintain a separate collective bargaining unit and contend that said pharmacists should be grouped in a single bargaining unit with the nonprofessional employees.

XIII.

That all of the plaintiffs herein contend that pharmacists are professional employees within the meaning of Section 2 (12) and Section 9 of the Labor Management Relations Act, 1947; [8] that

said pharmacists under the Labor Management Relations Act constitute a separate collective bargaining unit and may not be grouped in a single collective bargaining unit with nonprofessional employees in said agreement or any similar agreement, until an election, with the voting restricted to pharmacists in each drug store, has been held, and the majority vote thereof controls in accordance with the provisions of the Labor Management Relations Act of 1947.

XIV.

That the representatives of the defendant local unions maintained and still maintain that for the purpose of collective bargaining, the student pharmacists who are acting under the direct supervision of pharmacists compounding physician's prescriptions, preparing pharmaceutical preparations and other things as set forth in Section 4093 of the California Business and Professions Code which defines pharmaceutical experience necessary before a license can be obtained constitute a separate class; that the student pharmacists are not professional employees within the meaning of Section 2 (12) and Section 9 (b) of the Labor Management Relations Act, 1947, 29 U.S.C. 152 (12) and Section 159 (b); that the defendants have classified student pharmacists as being regular employees for purposes of said agreement; that said defendants refuse to permit the student pharmacists who are acting under the direct supervision of pharma-

cists to maintain a separate collective bargaining unit and contend that said student pharmacists should be grouped in a single bargaining unit with the nonprofessional employees. [9]

XV.

That the plaintiffs James A. Bennett and Charles G. Weir, student pharmacists, contend that student pharmacists are professional employees within the meaning of Sec. 2(12) and 9(b) of the Labor Management Relations Act, 1947; that said student pharmacists under the Labor Management Relations Act, 1947, constitute a separate collective bargaining unit and may not be grouped in a single collective bargaining unit with nonprofessional employees in said agreement or any similar agreement, until an election, with the voting restricted to student pharmacists in each drug store, has been held, and the majority vote thereof controls in accordance with the provisions of the Labor Management Relations Act of 1947.

XVI.

That the defendants Retail Clerks Union, Local No. 770 and No. 324 have not filed with the Secretary of Labor any of the reports, forms, affidavits and other documents required by Section 9(f), 9(g) and 9(h) of the Labor Management Relations Act, 1947; that the defendants have not filed an application for an election to determine whether they are proper bargaining agents for pharmacists in

said drug stores and/or the other employees of said drug stores. Defendants have not been certified by the National Labor Relations Board as the proper bargaining unit for any employees of plaintiffs, or any of the other members of the Druggists Association, and neither [10] defendant represents a majority of all of the employees, nor a majority of the pharmacists, nor a majority of the student pharmacists employed at any one drug store, nor employed at all of the drug stores owned by plaintiffs and none of said pharmacists have voted to be included in either of said unions as a member or to be represented by them or by a member of the bargaining unit represented by said unions.

XVII.

That in the latter part of 1947 and continuously thereafter and up to and including the time of filing of this action, representatives of the defendant local unions stated to certain of the plaintiff employers and to the plaintiff, Retail Druggists Association, that said local unions desired to represent employees of said plaintiff employers for the purpose of collective bargaining and requested plaintiff employers to execute the agreement hereinabove referred to, and representatives of said local unions stated to certain of said plaintiff employers on numerous occasions and still state and threaten, that unless plaintiff employers execute said agreement, said local unions would cause the respective business establishments to be picketed. On November 6, 1947,

defendant Joseph T. DeSilva, Secretary of the Food and Drug Council of Los Angeles and Vicinity and Secretary of Retail Clerks Union Local No. 770 caused the Sureway Drug Company located at 8539 South Vermont, Los Angeles, California, to be picketed and said picketing continued for some period of time; that the defendant local unions contend that they have the right to peacefully picket all of said drug stores who are plaintiffs in this action, notwithstanding said local unions failure to comply [11] with the Labor Management Relations Act of 1947, for the purposes of:

1. Compelling pharmacists and student pharmacists to become members of said union without the right of a separate collective bargaining unit; and

2. Compelling pharmacists and student pharmacists of said businesses to become members of said unions before an election has been had to determine the wishes of the majority of said employees, as provided for in Section 9(b) (1) and 9(e) of the Labor Management Relations Act of 1947; and

3. Plaintiffs have been informed by agents and representatives of said defendants and believe, and upon such information and belief allege, that a further purpose for the asserted right to maintain pickets at said places of business is to compel the plaintiff employers to sign said contract; and

4. Plaintiff employers and the Druggists Association contend that the purpose of said picketing

is to encourage common carriers and for preventing employees from transporting and delivering supplies to and from said business establishments and thus to impose economic coercion on said plaintiff employers in order to compel them to sign said agreement.

XVIII.

Plaintiff employers and plaintiff Retail Drug-gists Association contend in refusing to execute said agreement with the defendant unions that if picketing is begun for any of the purposes set forth above in paragraph XVII as said union contends they have a right to do, it would constitute a violation of Section 8(b) (2) of the Labor Management Relations Act and constitute unfair practice of a labor organization in that said picketing would coerce the employers to discriminate against all of said employees and/or pharmacists; that said picketing would in turn compel the employers, plaintiffs herein, to violate Section 8(a)(3) [12] of the Labor Management Relations Act, which provides that an employer can make an agreement with a labor organization requiring union membership If Such labor organization is the representative of the employees, as provided in Section 9(a) And If the board has certified per an election that at least a majority of employees qualified to vote have voted to authorize such labor organization to make such agreement; that the defendants contend that such picketing would not be a violation of Section 8(b)

(2) of the Labor Management Relations Act, nor that it would compel plaintiff employers to violate Section 8(a) (3) of said act.

XIX.

That plaintiffs George J. Gingras and Pete Negrete, pharmacists, and plaintiffs James A. Bennett and Charles G. Weir, student pharmacists, and all of the pharmacists and student pharmacists represented herein, contend that such picketing would infringe on the rights guaranteed them under Section 7 of the Labor Management Relations Act where the employee has a right to refrain from any or all activities as authorized by Section 8(a) (3) and that said picketing would be in violation of Section 8(a) (1) of the Labor Management Relations Act where it is deemed an unfair practice of the labor organization to coerce employees in exercise of any of the rights guaranteed them in Section 7 of said act; that said unions contend that such picketing would not infringe on any of the rights guaranteed the pharmacists under Section 7 of said act, nor would such constitute an unfair practice of a labor organization in violation of Section 8(a) (1) of said act.

XX.

That plaintiffs George J. Gingras and Pete Negrete, pharmacists, and plaintiffs James A. Bennett and Charles G. Weir, student pharmacists, and all of the pharmacists and student pharmacists represented herein, contend that said picketing

would infringe on the rights given them as professional employees to [13] vote separately and maintain a separate collective bargaining unit as guaranteed them in Section 9(b) (1) of the Labor Management Relations Act; that defendant contends that said picketing would not infringe on any rights guaranteed plaintiff pharmacists and student pharmacists to maintain a separate collective bargaining unit for the reason that they are not professional employees within the meaning of said act.

XXI.

That plaintiff pharmacists and student pharmacists contend that they would not have to join said unions if the employers sign said agreement, since they have not been allowed the privilege of a separate bargaining unit; that defendant unions contend that said pharmacists would be compelled to join said unions if the employer sign said contract, whether the unions have been certified as collective bargaining agents of said pharmacists and student pharmacists or not.

XXII.

That plaintiff employers and the Retail Druggists Association contend that if said agreement were entered into, it would be invalid in its entirety in those business concerns where the union does not represent any employees or pharmacists or student pharmacists whatsoever; that it would be invalid insofar as it pertains to pharmacists and student

pharmacists in those business establishments where the unions already represent the nonprofessional employees; that the defendants contend that said agreement would not be invalid in its entirety, nor would any part thereof be invalid, for any of the reasons heretofore alleged.

XXIII.

That plaintiff employers contend that picketing would be for the purpose of encouraging common carriers and their employees in the normal course of their employment from transporting [14] and delivering supplies to and from said plaintiffs' business establishments and thus impose economic coercion on said plaintiffs in order to compel them to sign said agreement; that such picketing would be in violation of Section 8 (b)(4)(A), as well as Section 8(b)(2) of the Labor Management Relations Act, the first provision being against secondary boycotts; that such picketing for said purpose is further illegal due to the fact that said unions have not complied with the provisions of the Labor Management Relations Act heretofore alleged; that defendants contend that such is not the purpose, but even if it is, it does not constitute a violation of Section 8(b)(2) nor 8(b) (4)(A) of the Labor Management Relations Act.

Wherefore, plaintiffs pray for declaratory judgment:

1. That pharmacists in all of the drug stores who are represented in this action be classified as pro-

fessional employees within the meaning of Section 2(12) of the Labor Management Relations Act of 1947.

2. That student pharmacists in all of the drug stores who are represented in this action be classified as professional employees within the meaning of Section 2(12) of the Labor Management Relations Act of 1947.

3. That it be declared that picketing by a labor organization which has or has not filed the affidavits and documents required by Section 9(f)(g) and (h) of the Labor Management Relations Act for the purpose of compelling pharmacists and/or student pharmacists to become members of said union without the right of a separate collective bargaining unit constitutes unfair practice of a labor organization under Section 8(a)(1) of the Labor Management Relations Act, and further such picketing infringes on the rights guaranteed said pharmacists and student pharmacists guaranteed them [15] under Section 7 of the Labor Management Relations Act.

4. That it be declared that picketing by a labor organization which has or has not filed the affidavits and documents required by Section 9(f)(g) and (h) of the Labor Management Relations Act for the purpose of compelling plaintiff employers to sign an agreement, which agreement includes pharmacists and student pharmacists in the category of nonprofessional employees where the union has not been certified as a bargaining agent of said pharma-

cists, constitutes a violation of Section 8(b)(2) and that such picketing does in turn compel employers to violate Section 8(a)(3) of the Labor Management Relations Act.

5. That it be declared that pharmacists and student pharmacists would not be compelled to join said unions in the event their respective employer signed said labor agreement, which included them as nonprofessional employees where they have not been allowed to be recognized as a separate collective bargaining unit.

6. That it be declared that an agreement entered into between and employer and a labor organization, which labor organization has not filed the documents and affidavits required in the Labor Management Relations Act, nor has been certified as a collective bargaining agent of any of the employees of such an employer, be declared invalid in its entirety.

7. That it be declared that a labor agreement entered into by an employer and labor organization, where the agreement provides that pharmacists and student pharmacists should not be treated as professional employees, be declared invalid as to that part whether said union has filed its documents under the Labor Management Relations Act or not.

8. That it be declared that picketing of a business concern by a labor organization that has not filed the documents and affidavits required under the Labor Management Relations Act, [16] nor

which is a certified bargaining agent of any of the employees of said business establishment for the purpose of encouraging common carriers and their employees in the normal course of their employment from transporting and delivering supplies to and from such a business establishment constitutes a violation of Section 8(b)(4)(A) of the Labor Management Relations Act, as well as a violation of Section 8(b)(2) of the Labor Management Relations Act.

8. For costs of this action and for such other and further relief as may be just.

J. WESLEY CUPP,
ROY B. WOOLSEY,
Attorneys for Plaintiffs.

By /s/ J. WESLEY CUPP.

State of California,
County of Los Angeles—ss.

George Q. Baird being by me first duly sworn, deposes and says: that he is the Executive Secretary of plaintiff corporation Southern California Retail Druggists Association, Ltd., one of plaintiffs herein and suing in behalf of all of its members, in the above entitled action; that he has read the foregoing Complaint for Declaratory Judgment and knows the contents thereof; and that the same is true of his own knowledge, except as to the mat-

ters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ GEORGE Q. BAIRD.

Subscribed and sworn to before me this 10th day of January, 1949.

[Seal] /s/ SHAN E. BULLOCK,
Notary Public in and for the County of Los Angeles, State of California.

Copy received:

[Endorsed]: Filed Jan. 11, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS COMPLAINT FOR DECLARATORY JUDGMENT

To J. Wesley Cupp and Roy B. Woolsey, 440 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California, attorneys for plaintiffs;

Please Take Notice That on the 14th day of March, 1949, at 10:00 a.m. or as soon thereafter as counsel can be heard, defendants will appear before this court at the United States Post Office and Courthouse Building in the City of Los Angeles, State of California, and will bring the following motion on for hearing:

I.

To dismiss this proceeding on the ground that the court lacks jurisdiction over the same, in that the complaint herein has been filed under color of authority of the Labor Management Relations Act, 1947, (29 U. S. C., Sec. 141 et seq.) and that as provided by Section 10 of this Act and decisions interpreting this Act which are contained in the Memorandum of Points and Authorities attached hereto and made a part of this motion, the National Labor Relations Board has exclusive jurisdiction over all controversies involving unfair labor practices and interprets and administers the unfair labor management act in the first instance except where specific jurisdiction over the subject matter is conferred.

II.

To dismiss this proceeding on the ground that the essential elements of Federal jurisdiction have not been met in the complaint in that there is no showing other than by conclusion that the matter in controversy exclusive of interests and costs exceeds the sum of \$3,000 nor is there any showing of [20] diversity of citizenship between the parties or any showing that Federal jurisdiction is secured pursuant to any federal statute applicable hereto.

III.

To dismiss this proceeding for a Declaratory Judgment on the ground that under the Federal Declaratory Judgment Act of June 14, 1934, (28

U. S. C., Section 400) and entitled, Title 28, Chapter 151, Sections 2201 and 2202 under the new Federal Judicial Code, and also under Article III, Section 2 of the Constitution of the United States, no case or justiciable controversy is raised by the complaint herein, and that as a matter of fact plaintiffs are herein merely seeking an advisory opinion contrary to the meaning and intent of the Declaratory Judgment Act and Article III, Section 2 of the United States Constitution above-mentioned.

IV.

To dismiss the proceeding herein on the grounds that the complaint is sham and frivolous and does not state a cause of action.

V.

To dismiss this proceeding herein on the grounds that there is not a proper joinder of parties nor a common question of law or fact involved nor a common relief sought as required by Rule 23 of the Rules of Federal Court.

/s/ ROBERT W. GILBERT,

/s/ LOUIS A. NISSEN,

Attorneys for Particular Defendants Retail Clerks'
Union No. 324 and Richard L. Johnston. [21]

Memorandum of Points and Authorities

I.

Labor Management Relations Act, 1947 (29 U. S. C., Section 141 et seq.).

II.

Neither a United States District Court nor a State court has any legal right to infringe upon the exclusive jurisdiction of the National Labor Relations Board by entertaining an action brought by a private party to prevent alleged "unfair labor practices" of employers or unions. The National Labor Relations Board was and remains with exclusive jurisdiction to determine whether or not unfair labor practices have been committed and to afford relief against the continuation of such practices. The Federal District Courts are without jurisdiction to redress by injunction or otherwise the unfair labor practices defined in the National Labor Relations Act.

Amazon Cotton Mill Company vs. Textile Workers Union of America, (decided April 1, 1948, C.C.A. 4th), 167 Fed. (2d) 183.

Dixie Greyhound Bus Lines vs. Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, 15 Labor Cases 74,687 (C.C.A. 8th D. November 26, 1948), Fed., U. S.

International Longshoremen's and Warehousemen's Union vs. Sunset Line and Twine Co., (U. S. Dist. Ct., N. D. Cal. April 8, 1948), 77 Fed. Supp. 119.

See also Bakery Sales Drivers' Local Union vs. Wagshal, 333 U. S. p. 442.

Gerry of California vs. Superior Court, 32 Cal. (2d) 119, 194 P. (2d) 689, decided by Cal. Supreme Court June 16, 1948.

In Re DeSilva, 33 A. C. 44 decided November 16, 1948.

III.

The Supreme Court of the United States has also recognized the application of the long settled rule of the judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.

Meyers vs. Bethlehem Steel Corp., 303 U. S. at pp. 50-51.

See also Newport News Co. vs. Schauffer, 303 U. S. 54 (58 Sup. Ct. 466).

United Brick and Clay Workers vs. Lebus, 71 Fed. Supp. 121. [22]

IV.

The Declaratory Judgment Act in no way enlarges the jurisdiction of the Federal courts; one of the usual bases of jurisdiction must be shown to exist.

Putnam vs. Ickes, 78 Fed. (2d) 223 (dismissed for improper venue for lack of jurisdiction over the land whose patent was sought to be revoked and over defendants in personam).

V.

The danger or dilemma of the plaintiff must be present, not contingent on the happening of hypothetical future events—although it may involve future benefits or disadvantages—and the prejudice to his position must be actual and genuine and not merely possible or remote to entitle a plaintiff to the rendition of a declaratory judgment.

Borchard Declaratory Judgments, Page 56.

VI.

Rules of Federal Court, Rule 23—Class Actions.

Affidavit of Service by mail attached.

[Endorsed]: Filed March 2, 1949. [23]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS COMPLAINT FOR DECLARATORY JUDGMENT

To: J. Wesley Cupp and Roy B. Woolley, 440 Subway Terminal Building, 417 South Hill Street, Los Angeles 13, California, Attorneys for Plaintiffs:

Please Take Notice that on the 14th day of March, 1949, at 10:00 A.M., or as soon thereafter as counsel can be heard, [25] Defendants, Retail Clerks Union, Local No. 770, an unincorporated association, and Joseph T. DeSilva, individually and as secretary of

said organization; Food and Drug Council of Los Angeles and Vicinity, an unincorporated association; Thomas Pitts, individually and as president of said organization, and Joseph T. DeSilva, individually and as secretary of said organization, will appear before this Court at the United States Post Office and Courthouse Building, in the City of Los Angeles, State of California, and will move to dismiss the Complaint for Declaratory Relief filed by Plaintiffs herein, upon the grounds and for the reasons as follows:

I.

That said Complaint does not, nor does any paragraph or part thereof, state facts sufficient to constitute a cause of action against these Defendants.

II.

That said Complaint does not, nor does any paragraph or part thereof, set forth jurisdictional facts sufficient to vest this Federal Court with jurisdiction of the alleged subject matter of the action; in that the Complaint has been filed under purported authority of the Labor Management Relations Act, 1947 (29 U.S.C. Sec. 141 et seq), and that as provided by Section 10 of this Act and the decisions thereunder, as set forth in the Memorandum of Points and Authorities attached hereto and made a part of this Motion, the National Labor Relations Board has exclusive jurisdiction over all controversies involving unfair labor practices and interprets and administers the Labor Management Re-

lations Act in the first instance except where specific jurisdiction over the subject matter is conferred.

III.

That the subject matter of the action allegedly set forth in said Complaint is beyond the jurisdiction of the Court, [26] since in the first instance, the determination, under the Labor Management Relations Act, 1947, of whether or not any given party is within the purview of the Act, is within the exclusive jurisdiction of the National Labor Relations Board.

IV.

That this Court has no jurisdiction of the subject matter set forth in the Complaint, since under the Labor Management Relations Act, 1947, any relief which may resolve the matters allegedly set forth in the Complaint could only be secured either by an injunction or other appropriate remedy, jurisdiction of which rests exclusively under the Labor Management Relations Act, 1947, with the National Labor Relations Board in the first instance.

V.

That the Complaint fails to set forth any facts legally sufficient to confer jurisdiction on this Court in respect to the proper and ultimate allegation of substantive facts to establish interstate commerce within the purview of the Labor Management Relations Act, 1947.

VI.

That the essential elements of Federal jurisdiction have not been met in the Complaint, in that there is no showing other than by conclusion that the matter in controversy exclusive of interests and costs exceeds the sum of \$3,000, nor is there any showing of diversity of citizenship between the parties or any showing that Federal jurisdiction is secured pursuant to any Federal statute applicable hereto.

VII.

That under the Federal Declaratory Judgment Act of June 14, 1934, (28 U.S.C. § 400), and entitled, Title 28, Chapter 151, Sections 2201 and 2202 under the new Federal Judicial Code, and also under Article III, Section 2 of the Constitution of the [27] United States, no case or justiciable controversy is raised by the Complaint herein, and that as a matter of fact, Plaintiffs are herein merely seeking an advisory opinion contrary to the meaning and intent of the Declaratory Judgment Act and Article III, Section 2 of the United States Constitution above-mentioned.

VIII.

That there is not a proper joinder of parties nor a common question of law or fact involved, nor a common relief sought as required by Rule 23 of the Rules of Federal Court.

Wherefore, these appearing Defendants pray that

the Complaint be dismissed and that they recover their costs of suit incurred herein.

Dated: March 3, 1949.

Respectfully submitted,

/s/ ALEXANDER H.

SCHULLMAN,

Attorney for Defendants Retail Clerks Union, Local 770, Joseph T. DeSilva, individually and as Secretary thereof; Food and Drug Council of Los Angeles and Vicinity, Thomas Pitts, individually and as President thereof; and Joseph T. DeSilva, individually and as Secretary thereof. [28]

Memorandum of Points and Authorities

I.

Labor Management Relations Act, 1947 (29 U.S.C. Sec. 141 et seq).

II.

The relief requested by Plaintiffs in their Complaint for Declaratory Relief is tantamount to requesting a declaration by this Court that Defendants, either in their actions as alleged or in their contemplated actions, are committing or intend to commit unfair labor practices within the meaning of Section 10 (b) (2) and Section 8 (b) (4) (A), of the Labor Management Relations Act, 1947; neither United States District Courts nor State Courts have any jurisdiction, concurrent or other-

wise, to entertain an action brought by a private party to prevent alleged "unfair labor practices" of employers or unions. The National Labor Relations Board was and remains with exclusive jurisdiction to determine whether or not unfair labor practices have been committed and is the exclusive agency, Congressionally created, to afford relief against a continuation of such practices. The Federal District Courts are without jurisdiction to redress by injunction or otherwise the unfair labor practices defined in the Labor Management Relations Act, 1947.

Amazon Cotton Mill Company vs. Textile Workers Union of America (decided April 1, 1948, C.C.A. 4th), 167 Fed. (2d) 183;

Dixie Greyhound Bus Lines vs. Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, 15 Labor Cases 74,687 (C.C.A. 8th D. November 26, 1948), Fed., U.S.;

International Longshoremen's and Warehousemen's Union vs. Sunset Line and Twine Co. (U.S. Dist. Ct., N.D. Cal. April 8, 1948), 77 Fed. Supp. 119;

See also Bakery Sales Drivers Local Union vs. Wagshal, 333 U.S. p. 442;

Gerry of California vs. Superior Court, 32 Cal. (2d) 119, 194 P. (2d) 689, decided by Cal. Supreme Court June 16, 1948;

In Re DeSilva, 33 A.C. 44 decided November 16, 1948:

in [29] this matter, an owner of a drug store who was plaintiff in the action brought in the Superior Court of the County of Los Angeles, State of California, and who was and is a member of the Plaintiff Association in this action, and who was then represented by the same counsel as represents Plaintiffs in this action, sought relief by requesting an injunction against the instant Defendants in this matter for the alleged unfair labor practices committed by said Defendants. The State Superior Court granted the injunction, and thereupon, following an alleged violation of the injunction, one of the Defendants was found guilty of contempt, and upon a writ of Habeas Corpus to the California State Supreme Court, the Court unanimously renounced that exclusive jurisdiction for redress by injunction or otherwise of unfair labor practices as defined in the Labor Management Relations Act, 1947, rests exclusively with the National Labor Relations Board, and no private party may initiate any action either in the State or Federal Courts for such relief.

III.

The Supreme Court of the United States has also recognized the application of the long settled rule of the judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.

Meyers vs. Bethlehem Steel Corp., 303 U.S.

at pp. 50-51;

See also *Newport News Co. vs. Schaffer*,
303 U.S. 54 (58 Sup. Ct. 466) ;

United Brick and Clay Workers vs. Lebus,
71 Fed. Sup. 121. [30]

IV.

The National Labor Relations Board also has exclusive jurisdiction to initially determine whether or not parties come within the purview of the Labor Management Relations Act, 1947, in respect to interstate commerce, and also has exclusive jurisdiction to determine representation proceedings.

Industrial Commission of the State of Utah, etc., et al vs. NLRB, U.S.C.A. 10th Cir. (January 31, 1949) 16 Labor Cases, 64,947;
LaCrosse Telephone Corp. vs. Wisconsin Employment Relations, et. al, U.S., 16 Labor Cases 64,913 (January 17, 1949);
NLRB vs. Jones and Laughlin Steel Corp., 301 U.S. 1, p. 29.

V.

The Declaratory Judgment Act in no way enlarges the jurisdiction of the Federal Courts; jurisdiction, before an action may be entertained under the Declaratory Judgment Act, must exist; an action may not be maintained under said Act merely because the Plaintiff refuses to use the forum Congressionally established, viz: in this case, Plaintiffs, if unfair labor practices are being committed in violation of the Labor Management Relations Act,

1947, can utilize the National Labor Relations Board by having charges filed with the Board for the purpose of having the Board determine whether or not a Complaint is issuable under the facts in consonance with the Act.

Putnam vs. Ickes, 78 Fed. (2d) 223 (dismissed for improper venue for lack of jurisdiction over the land whose patent was sought to be revoked and over defendants in personam);

Continental Casualty Co. vs. National Household Distributors, 32 F. Supp. 849 (D.C. Wis. 1940):

The Court held in this case that the Declaratory Judgment Act should not be used as an instrument of procedural fencing for the purpose of choosing a forum; Commercial Casualty Ins. Co. vs. Fowles, C.C.A. Wash. (1946), 154 Fed. (2) 884; [31]

West Pub. Co. vs. McColgan, 138 Fed. (2nd) 320 (C.C.A. Cal. 1943);

Sinclair Refining Co. vs. Burroughs, 133 Fed. (2nd) 536 (C.C.A. Okl. 1943);

Mutual Life Ins. Co. of New York vs. Moyle, 116 Fed. (2nd) 434 (C.C.A.S.C. 1940);

State of Wyoming vs. Franke, 58 F. Supp. 890 (D.C. Wyo. 1945);

wherein the Court held that declaratory relief would not lie, nor could it be substituted by an injunction, since an injunction would not lie to enjoin Federal interference with the State's control over the Jack-

son Hole Country in Wyoming, which had been designated by Presidential Proclamation on March 15, 1943; in the instant matter, Congress had expressly limited the jurisdiction under the Labor Management Relations Act, 1947, for the redress of unfair labor practices exclusively with the National Labor Relations Board; hence, declaratory relief in this matter cannot lie and the Complaint must be dismissed;

Whisler vs. City of West Plains, 137 Fed.
(2nd) 938 (C.C.A. Mo. 1943);

Angell vs. Schram, 109 Fed. (2nd) 380
(C.C.A. Mich. 1940);

Perlberg vs. Northwestern Mut. Life Ins. Co.,
62 F. Supp. 76 (D.C. Pa. 1945);

where the Court held that a declaratory judgment should not be granted where it is within plaintiff's power to make the declaration he seeks purely academic by acts within his own control, and where the decision therein could not finally settle the rights of the parties.

VI.

The Declaratory Judgment Act (U.S.C.A. Title 28, Section 400) is not designed, nor is its purpose, to extend jurisdiction over an area not already covered or expressly forbidden.

Di Bendetto vs. Morgenthau (1945), 148 Fed.
(2nd) 223; [32] 80 U.S. App. D.C. 34,
certiorari dismissed, 326 U.S. 686;

U. S. ex rel. Jordan vs. Ickes, (1944), 143

Fed. (2d) 152, 79 U. S. App. D. C. 144, certiorari denied, 320 U. S. 801;

In this case, it was held that where the Federal Court lacked jurisdiction of a suit for direct coercive relief compelling the Secretary of Interior to execute and deliver prospecting leases for oil and gas on submerged public lands, the court did not acquire jurisdiction, by virtue of this section, to give, indirectly, relief which it could not give directly.

Miles Laboratories vs. Federal Trade Commission, (1944), 140 Fed. (2d) 683, 78 U. S. App. D. C. 326, certiorari denied, 322 U. S. 752, wherein it was stated that this section (Declaratory Judgment Act) is not itself a source of Federal jurisdiction and cannot enlarge the pre-existing jurisdiction of the Federal Courts.

Utah Fuel Co. vs. National Bituminous Coal Commission, (1938), 101 Fed. (2d) 426, 69 App. D. C. 33, affirmed 306 U. S. 56,

wherein the court held that the new power given to the Federal Courts to render a declaratory decree does not authorize a court of equity by declaration to stop or interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with or stopped them under its power to enjoin. (There is nothing that prevents plaintiffs, assuming their factual declaration is correct or tenable, from proceeding through the National Labor Relations Board.);

Washington Terminal Co. vs. Boswell (1941),
124 Fed. (2d) 235, 75 U. S. App. D. C. 1,
certiorari denied, 315 U. S. 795;

Helco Products Co. vs. McNutt, (1943), 137
Fed. (2d) 681.

VII.

An action for declaratory judgment cannot be maintained for veiled purpose of relitigating questions as to which a former [33] judgment is conclusive. The State Supreme Court of California and the Federal Courts have ruled that the exclusive jurisdiction under the Labor Management Relations Act, 1947, to enjoin unfair labor practices rests with the National Labor Relations Board, and not with private parties who initiate the action in either State or Federal Courts.

Chicago Pneumatic Tool Co. vs. Hughes Tool
Co., (D. C. Del. 1945), 61 F. Supp. 767,
affirmed 156 Fed. (2d) 981; certiorari de-
nied, 67 S. Ct. 204.

Respectfully submitted,

/s/ ALEXANDER H. SCHULLMAN

Attorney for Defendants: Retail Clerks' Union,
Local 770; Joseph T. DeSilva, individually and
as Secretary thereof; Food and Drug Council
of Los Angeles and Vicinity, Thomas Pitts, in-
dividually and as President thereof; and Joseph
T. DeSilva, individually and as Secretary
thereof.

Received copy of the within Notice of Motion
this 3rd day of March, 1949

/s/ J. WESLEY CUPP,
Attorney for Plaintiffs.

[Endorsed]: Filed March 7, 1949. [35]

[Title of District Court and Cause.]

STATEMENT OF REASONS IN OPPOSITION
TO MOTIONS TO DISMISS THE COM-
PLAINT AND ANSWERING MEMORAN-
DUM OF POINTS AND AUTHORITIES.

Plaintiffs reasons in opposition to the Notice of
Motion and/or the Motion of appearing defendants,
and plaintiffs Answering Memorandum of Points
and Authorities are as follows:

I.

The documents filed herein by appearing defend-
ants are labeled and constitute merely a Notice of
Motion. They have failed to file a written motion.
This is particularly true of the document filed by
and on behalf of the Retail Clerks Union, Local
No. 324, and Richard L. Johnson. While the docu-
ment filed by Retail Clerks Union, Local No. 770
and the defendants joining in said document prays
for dismissal of the complaint, the document is lab-
eled Notice of Motion and reads that the parties

[36] will move for dismissal. In United States District Courts motions must be in writing.

Rule 7(b) Federal Rules of Civil Procedure;

Rule 3(i) Rules of the United States District Court of the Southern District of California.

II.

The National Labor Relations Board does not have exclusive jurisdiction over controversies involving unfair labor practices, nor over controversies involving the compelling or coercing of an employer to commit an unfair labor practice within the meaning of the Labor Management Relations Act, 1947.

Labor Management Relations Act 1947, 29 U.S.C. Sec. 141, et seq.

Standard Grocer Company v. Local 406, etc.
et al (Mich. 1948) 32 N. W. (2d) 519 14
C.C.H. Lab. Cases 64,523.

Scranton Broadcasters v. American Communication Association (Pa. Ct. Com. Pleas, 1947), 13 C.C.H. Lab. Cases 64,124.

Clelland Simpson Co. v. American Communication Association (Pa. Ct. Com. Pleas Nov. 12, 1947), 13 C.C.H. Lab. Cases 64,125.

District Lodge 94 v. International Association of Machinists, etc., et al, (D. C. S. D. Cal. No. 7685, 1948), 15 Lab. Cases 64,564.

III.

Jurisdiction has been pleaded.

(a) The United States District Courts have jurisdiction of civil cases where the matter in contro-

versy exceeds the sum of \$3,000.00 and the case arises under a law of the United States.

28 U.S.C. Sec. 41(1). [37]

American Distilling Co. v. City of Sausalito
(D. C. N. D. Cal. 1947), 73 Fed. Supp. 520.

James Hiddon's Sons v. Calender (D. C.
Minn. 1939), 28 Fed. Supp. 643.

(b) The United States District Courts have jurisdiction of all suits arising under a law regulating commerce whether or not the amount in controversy exceeds the sum of \$3,000.00.

28 U.S.C. Sec. 41 (8);

Weiss v. Los Angeles Broadcasting Co.
(C.C.A. 9th 1947), 163 F. (2d) 313;

Robertson v. Argus Hosiery Mills (C.C.A.
6th 1941), 121 F. (2d) 285.

IV.

Interstate commerce has been properly alleged.

N.L.R.B. v. Fainblatt et al., 306 U. S. 601,
59 S. Ct. 668, 1939.

N.L.R.B. v. Richter's Bakery, 140 F. (2d)
870 (C.C.A. 5).

N.L.R.B. v. Suburban Lumber Company, 121
F. (2d) 829 (C.C.A. 3), cert. den. 322 U. S.
754.

V.

A justiciable controversy has been pleaded and declaratory relief is proper.

Federal Declaratory Relief Act of June 14, 1934
(28 U. S. C. Sec. 400);

Maryland Casualty Co. v. Hubbard (D. C.
S. D. Cal. 1938), 22 Fed. Supp. 697.

Lehigh Coal and Navig. Co. v. Central R. of
N. J. (D. C. E. D. Pa. 1940), 33 Fed.
Supp. 362.

District Lodge 94 v. International Association
of Machinists, etc., et al, (D. C. S. D. Cal.
No. 7685, 1948), [38] 15 Lab. Cases 64, 564.

Respectfully submitted,

J. WESLEY CUPP &

ROY B. WOOLSEY,

Attorneys for Plaintiffs.

By /s/ J. WESLEY CUPP.

Affidavit of service by mail attached.

[Endorsed]: Filed March 9, 1949. [39]

In the United States District Court Southern District of California, Central Division

No. 9098-BH Civil.

SOUTHERN CALIFORNIA RETAIL DRUG-
GISTS ASSOCIATION, LTD., etc., et al.,
Plaintiffs,

vs.

RETAIL CLERKS UNION, LOCAL NO. 770,
etc., et al.,

Defendants.

ORDER DISMISSING ACTION FOR WANT
OF JURISDICTION

On March 29, 1949, this cause came on regularly for the hearing of the Motion to Dismiss Complaint for Declaratory Judgment, filed March 2, 1949, by Defendants, Retail Clerks Union, Local No. 324, an unincorporated association; and Richard L. Johnston, individually and as secretary of said organization; Robert W. Gilbert and Louis A. Nissen, Esqs. appearing for said Defendants; and for hearing of the Motion to Dismiss Complaint for Declaratory Judgment, filed March 7, 1949, by Defendants, Retail Clerks Union, Local No. 770, an unincorporated Association; Joseph T. DeSilva, individually and as secretary of said organization; Food and Drug Council of Los Angeles and Vicinity, an unincorporated association; Thomas Pitts, individually and as president of said organization; and Joseph T. DeSilva, individually and as secretary of said organi-

zation; and Alexander H. Schullman, Esq. appearing for said Defendants; and J. Wesley Cupp and Roy B. Woolsey, Esqs. by J. Wesley Cupp, Esq. appearing for the Plaintiffs; and said Motions having been heard by the court, and the court having duly considered said motions, the complaint, memoranda of counsel, and the law applicable, and being fully advised in the premises, ordered said Motions of Defendants, granted on the ground that the court does not have jurisdiction herein;

It Is, Therefore, Hereby Ordered that this action be and it is hereby dismissed on the ground that this court does not have jurisdiction to entertain it.

Dated: Los Angeles, California, March 29, 1949.

/s/ BEN HARRISON,
U. S. District Judge.

Judgment entered Mar. 29, 1949.

Docketed Mar. 29, 1949.

[Endorsed]: Filed March 29, 1949. [41]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: The Honorable Benjamin Harrison, Justice of the said District Court of the United States for the Southern District of California, Central Division, and to Alexander H. Schullman and Robert W. Gilbert, Attorneys for Defendants:

Take Notice, that the plaintiffs in the above entitled action hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Judgment of the said District Court of the United States made and entered in the said court on the 29th day of March, 1949, sustaining the Motion to Dismiss the Complaint for Declaratory Judgment in favor of defendants and against the plaintiffs, and from the whole of said judgment.

/s/ J. WESLEY CUPP,
Attorney for Plaintiffs.

Affidavit of service by mail attached.

[Endorsed]: Filed April 12, 1949. [42]

[Title of District Court and Cause.]

DESIGNATION OF RECORD FOR APPEAL

To: The Honorable Benjamin Harrison, Justice of
the said District Court of the United States for
the Southern District of California:

Appellants herein, plaintiffs in the above entitled action, desire to, and do hereby, designate that the complete and entire records and Judgment Roll before this Court shall be contained in the Record on Appeal, said record to include all argument made by counsel before this Court on the Motion to Dismiss Complaint.

Dated: April 11, 1949.

/s/ J. WESLEY CUPP,
Attorney for Plaintiffs.

[Endorsed]: Filed April 12, 1949. [44]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of California

County of Los Angeles—ss.

Luella Schweigert, being first duly sworn, says:

That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to

the above entitled action; that affiant's business address is 417 South Hill Street, Los Angeles 13, California; that on the 13th day of April, 1949, affiant served the Designation of Record for Appeal heretofore filed on the defendants in said action by placing a true copy thereof in an envelope addressed to the attorneys of record for said defendants in said action at the office address of said attorneys as follows:

Alexander H. Schullman, 415 Subway Terminal Building, [45] 417 South Hill Street, Los Angeles 13, California, Attorney for defendants Retail Clerks Union, Local No. 770, Joseph T. DeSilva, individually and as Secretary thereof; Food and Drug Council of Los Angeles and Vicinity, Thomas Pitts, individually and as President thereof, and Joseph T. DeSilva, individually and as Secretary thereof.

Robert W. Gilbert, 117 West Ninth Street, Los Angeles 15, California, Attorney for Defendants Retail Clerks Union No. 324 and Richard L. Johnston, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorney for the persons by and for whom said service was made.

That there is delivery service by the United States mail at the place so addressed and there is a regular

communication by mail between the place of mailing and the place so addressed.

/s/ LUELLA SCHWEIGERT,

Subscribed and sworn to before me this 13th day of April, 1949.

[Seal] /s/ SHAN E. BULLOCK,
Notary Public in and for said County and State.

[Endorsed]: Filed April 14, 1949. [46]

[Title of District Court and Cause.]

ORDER GRANTING EXTENSION OF TIME
TO FILE TRANSCRIPT AND RECORD

Notice of Appeal and Designation of Record for Appeal having been duly filed on April 11, 1949, and a request placed with Mr. J. D. Ambrose, Reporter of the above-entitled United States District Court, that such transcript be placed with the Clerk of said Court for certification; and it having been shown that failure to file said transcript and record has been due entirely to the extremely crowded calendar of said reporter, J. D. Ambrose, and without any fault on part of Appellant;

It is Hereby Ordered that Appellants shall be, and hereby are granted thirty (30) days extension of time in which to file said transcript and record.

Dated: Los Angeles, California, May 20, 1949.

/s/ BEN HARRISON,

U. S. District Judge.

[Endorsed]: Filed May 23, 1949. [47]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 47, inclusive, contain the original Complaint for Declaratory Judgment; Notice of Motion of defendants Retail Clerks Union No. 324 et al to Dismiss; Notice of Motion of defendants Retail Clerks Union, Local No. 770 et al to Dismiss; Statement of Reasons in Opposition to Motions to Dismiss the Complaint etc; Order Dismissing Action for Want of Jurisdiction; Notice of Appeal; Designation of Record for Appeal; Affidavit of Mailing and Order Granting Extension of Time to File Transcript and Record which, together with original reporter's transcript of proceedings on March 29, 1949, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 17 day of June, A. D. 1949.

EDMUND L. SMITH,
Clerk.

[Seal]

By THEODORE HOCKE,
Chief Deputy. [49]

[Endorsed]: No. 12273 United States Court of Appeals for the Ninth Circuit. Southern California Retail Druggists Association, Ltd., a non profit corporation, etc., et al., Appellants, vs. Retail Clerks Union, Local No. 770, an unincorporated association, etc., et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 20, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12273

DESIGNATION OF RECORD

SOUTHERN CALIFORNIA RETAIL DRUG-
GISTS ASSOCIATION, LTD., a nonprofit
corporation, etc., et al,

Appellants,

vs.

RETAIL CLERKS UNION, LOCAL NO. 770, an
unincorporated association, etc., et al,

Respondents.

The Clerk of the United States Court of Appeals—
Ninth Circuit; Robert W. Gilbert, Louis A.
Nissen, and Alexander H. Schullman, Attorneys
for Respondents, will please take notice:

The Appellants herein designate that the entire
record in the above entitled action is material to the
review thereof and shall be made available for the
hearing of [53] this appeal, and it is hereby desig-
nated that the Clerk of the above entitled Court shall
have the said entire record printed on appeal.

/s/ J. WESLEY CUPP,
Attorney for Appellants.

[Endorsed]: Filed June 25, 1949. [54]

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANTS WILL RELY

Come now the Appellants, and for a Statement of
Points Upon Which Appellants Will Rely, set forth
the following:

I.

The alleged Remedy before the National Labor
Relations Board is in fact non-existent, and on these
facts there is NO remedy provided by the amended
National Labor Relations [51] Act of 1947 before
the National Labor Relations Board.

II.

This is an action equitable in nature, and unless specifically excluded from the jurisdiction of Court, jurisdiction will attach.

III.

Every element and requisite of Jurisdiction in the Federal Courts is present.

IV.

There is certain inherent jurisdiction, even in this Court of delegated powers, and Appellants present a case within the scope of that inherent jurisdiction.

/s/ J. WESLEY CUPP,

Attorney for Appellants.

[Endorsed]: Filed June 25, 1949. [52]

No. 12273
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA RETAIL DRUGGISTS ASSOCIATION,
LTD., a non-profit corporation, etc., *et al.*,

Appellants,

vs.

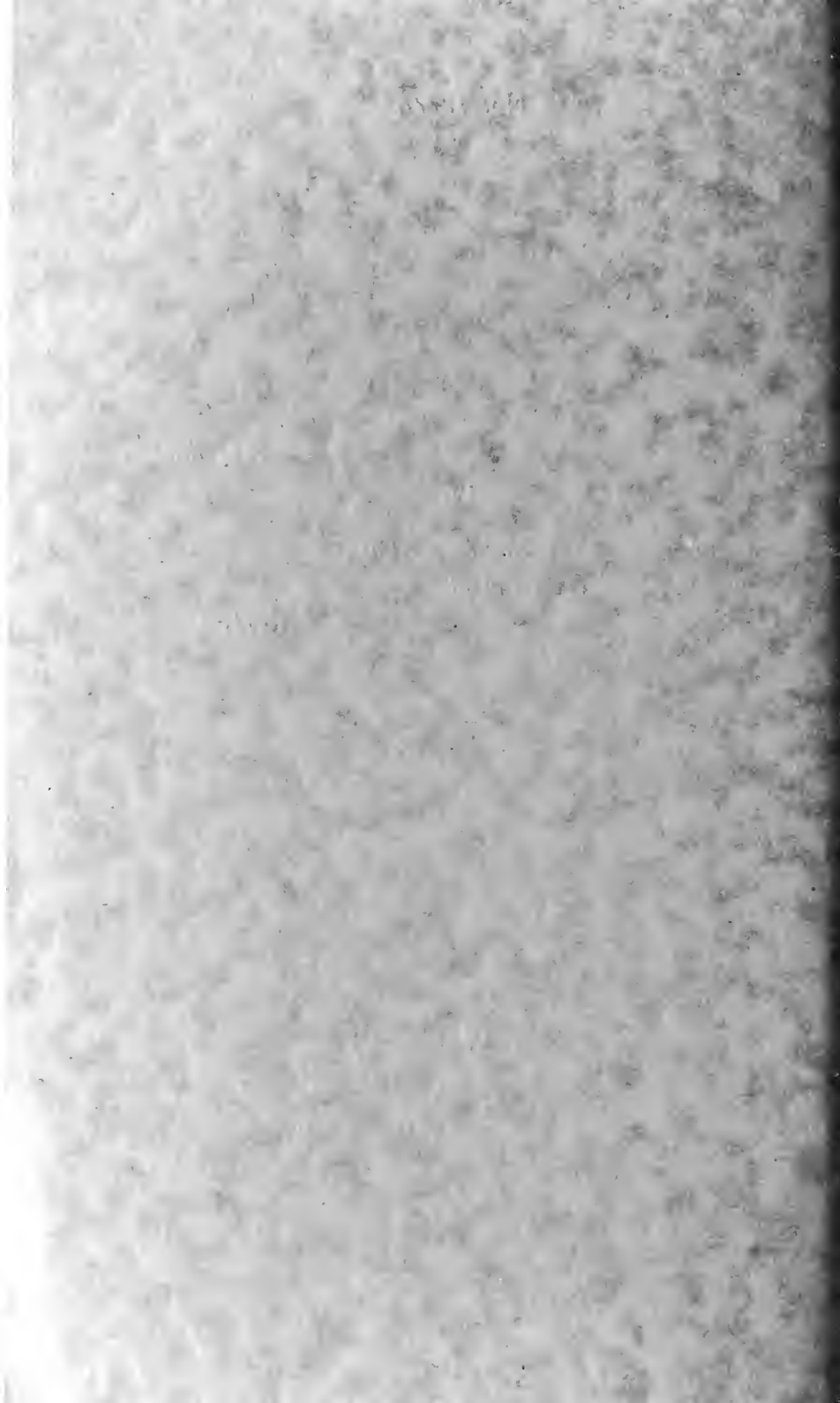
RETAIL CLERKS UNION, LOCAL No. 770, an unincorporated association, etc., *et al.*,

Respondents.

APPELLANTS' OPENING BRIEF ON APPEAL.

J. WESLEY CUPP,
440 Subway Terminal Building, Los Angeles 13,
Attorney for Appellants.

FILED
AUG 12 1949



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Appellants,

vs.

RETAIL CLERKS UNION, LOCAL No. 770, an unincorporated association, etc., *et al.*,

Respondents.

APPELLANTS' OPENING BRIEF ON APPEAL.

Facts.

This action was filed by the Retail Druggists Association of Southern California, representing several hundred druggists in this area, in conjunction with two druggists of that association and with two pharmacists and two student pharmacists employed in certain member drug stores.

The action is one for declaratory relief seeking an interpretation of a certain standard type contract or collective bargaining agreement which was presented to certain drug store proprietors by the respondent labor union, which provides that *pharmacists and student pharmacists shall be treated as non-professional employees* for the purposes of collective bargaining. In order to construe the contract, it is necessary to construe certain pertinent provisions of

the Amended National Labor Relations Act. The pharmacists and student pharmacists maintain that they are professional employees as defined under Section 12 of the Labor Management Relations Act of 1947, and are thus entitled to a separate bargaining unit. The union asserts that the pharmacists are non-professional employees under the Act and thus are not entitled to a separate bargaining unit. The employers, being represented by the Association, assert that if they sign said collective bargaining agreement with the respondent union, which union has not been certified as a collective bargaining agent for the employees or pharmacists, nor can they be so certified until they file the required documents and affidavits under Section 9 of the Labor Management Relations Act, it will constitute a violation by the employers of the Act, since the effect would be to coerce the pharmacists into joining a non-certified labor organization against their wishes and without an election, and without their rights of self-determination as provided for by said statute. Thus, the employers assert that the collective bargaining agreement is illegal and invalid in its entirety, and are here asking for an interpretation thereof.

The United States District Court, Southern District of California, Central Division, with Honorable Benjamin Harrison presiding, held that the District Court had no jurisdiction over the subject matter, *i. e.*, it apparently held that the appellant had not exhausted its remedies before the National Labor Relations Board. The court gave no grounds whatsoever to sustain its judgment, other than the foregoing finding and conclusion.

Thus, this appeal is taken by the Association, the employers and the pharmacists contending that they have no

remedy before the National Labor Relations Board since it is not the function of the Board to interpret a collective bargaining agreement, except in conjunction with an unfair practice charge, and, if we may rely on National Labor Relations Board precedent, there has been no unfair practice committed in the instant case.

The question before this court, stated concisely, is:

“May the District Court of the United States exercise jurisdiction in a matter involving labor relations which affect interstate commerce where there is an actual controversy and no remedy before the National Labor Relations Board as established by the Congress of the United States?”

The brief shall be controlled by thorough examination of the following major premises affirming jurisdiction in this court:

1. There is no remedy before the National Labor Relations Board provided by the Labor Management Relations Act of 1947.

2. This is an action that is equitable in nature, and unless specifically excluded from the jurisdiction of this court, then jurisdiction will attach.

3. Unless by the nature of the action, as set out in premise No. 2 above, the court is precluded from jurisdiction, every requisite element for jurisdiction in the Federal Court is present, to wit: An actual controversy, interpretation of a federal statute and hence a federal question, and the requisite jurisdictional amount.

4. There is certain inherent jurisdiction, even in a court of delegated powers, and this is a case which by nature involves the said inherent jurisdiction.

I.

There Is No Remedy Before the National Labor Relations Board Provided by the Labor Management Relations Act of 1947.

The Labor Management Relations Act of 1947, commonly known as the Taft-Hartley Act, and hereinafter referred to as the "Act," provides certain means and sets up certain requisites for application to the National Labor Relations Board, hereinafter referred to as the "Board," for relief from certain enumerated unfair labor practices.

The provisions of the Act that are pertinent to the discussion of this issue are:

Section 9(c)(1)(A) and (B): Which in substance provides that either a labor union or an employer may file a petition for an election;

Section 9(f)(g) and (h): Which provides that the union must file certain affidavits before it can file said petition for an election, and before the union can file a charge for unfair practices;

Section 10(h): Which nullifies the effect of the Norris-LaGuardia Act;

Section 8(b)(1) and (2): Which provides that it is an *unfair labor practice* of a *labor union* to coerce employees in the exercise of the rights guaranteed to them under Section 7, or to cause an *employer* to discriminate against employees in violation of Section 8(a)(3);

Section 7: Which provides that employees shall have certain rights, to wit: self-organization, to bargain collectively through representatives of their own choosing, and the right to *refrain* from all such activities except that as

such right is affected through an agreement requiring membership in a labor organization under Section 8(a)(3); and

Section 8(a)(1): Which provides that it is an unfair labor practice of an EMPLOYER to coerce employees in the exercise of their rights guaranteed to them under Section 7 and Section 8(a)(3), which provides that it is an unfair labor practice of an *employer* to *encourage* membership in a labor organization by entering into an agreement with a non-certified labor organization;

Section 9(b)(1): Which provides that the Board shall not decide that any unit is appropriate for such purposes if such unit includes *both professional employees and non-professional employees, unless a majority of such professional employees vote for inclusion in such unit.*

It should be noted at this point that the unions with which these petitioners are involved in controversy have not filed any of the reports or affidavits required by Section 9(f)(g) and (h).

Three steps are necessary to show that the petitioners herein have no adequate remedy, either before the Board, or before any other court:

(1) The fruitless attempt of employer to compel an election under Section 9 of the Act.

(2) The fruitless attempt of an employer to obtain relief in a state court.

(3) The fruitless attempt of an employer to file a charge of unfair practices against the union.

The first two of these propositions can be illustrated by showing the trials and tribulations of Nathan A. and

Lillian Simons, member drug store owners of the appellant Association.

Mr. Simons was presented with the same collective bargaining agreement as is in controversy in this action by the respondent Retail Clerks Union Local No. 770. Simons knew the position of his pharmacists and knew that the union had not filed the required documents with the National Labor Relations Board. He was afraid to sign the contract for fear that he would be charged with an unfair practice by the pharmacists or other persons, and yet he desired industrial peace. Therefore, he went to the National Labor Relations Board, Case No. 21-RM-24 (1948), and filed a petition to determine whether the union which had demanded recognition was the proper bargaining unit to represent his employees. (This was a petition for an election under Section 9(c)(1)(B), noted above.) However, the Board dismissed the petition on the ground that they had no jurisdiction, due to the failure of the union to file the required documents under Section 9(f)(g) and (h) of the Act, the opinion being handed down by Howard F. LeBaron, Regional Director, on the 10th day of June, 1948. Thus, a petition for an election does not afford any remedy for the appellants whatsoever. Also see *Herman Lowenstein, Inc.*, 75 NLRB 277. Teller on Labor Disputes, 1948 Supplement, page 116, paragraph 398.13, which held that an employer could not file a petition for certification against a non-complying union. By express provision in the Act, of course, a non-complying labor union cannot petition for an election.

Secondly, the local union began picketing Mr. Simons' little drug store. He couldn't get supplies; he lost many

customers and considerable trade. So he turned to the courts of the State of California to see if he could obtain an injunction. The Superior Court, with Judge Hanson writing the decision (CCH 14 Labor Cases, par. 64,465), granted an injunction against the picketing on the ground that it constituted unlawful coercion and there was no remedy before the Board since it was a non-complying or "outlaw" union, in the words of Judge Hanson. However, the Supreme Court of California reversed the lower court in the matter of *Joseph T. DeSilva*, 199 P. 2d 6 (1948), (rehearing denied; which opinion is attached hereto; the action was taken up on habeas corpus since the union immediately violated the injunction), on the ground that the Federal Government had preempted the field of labor relations—that the employer had not exhausted his administrative remedy—to wit: Filing an unfair labor practices charge against the union with the Board. Filing the petition for election and certification did not exhaust all the remedies.

It is conceded by the appellants herein that Simons had probably not exhausted his administrative remedy in that situation since there is no decision holding that an employer cannot file an unfair practices charge against a non-complying union, as distinguished from a petition for an election. *There an unfair practice was being committed, to wit: Coercion in the physical form of picketing to compel the employer to encourage membership in a labor organization by signing the disputed contract in violation of Section 8(a)(3) of the Act, which is an unfair practice of a labor union under Section 8(b)(2).* However, it has been subsequently held, both in Wisconsin and New Jersey, that in SUCH A SITUATION AS EXISTED IN THE

“SIMONS CASE,” AN UNFAIR LABOR PRACTICE ACTUALLY EXISTING, THAT THE EMPLOYER MAY PURSUE INJUNCTIVE RELIEF IN THE STATE COURTS. (*Rice & Holman v. United Electrical Workers*, CCH 16 Labor Cases 65,087; *Int’l Union UAW-AFL, Local 232, v. Werb*, CCH 16 Labor Cases 64,992.) *But it is not contended by appellant, nor was it shown by respondent or the Honorable District Court, that any unfair labor practice has, at this time, been committed so as to enable petitioners to go before the Board or again petition the state courts for a redress of grievances. It is further contended by the appellants (which point the California Supreme Court failed to discuss and which is alleged and prayed for in the complaint in this action) that coercion by picketing to compel an employer to sign a contract with a union that has not filed the proper documents and affidavits, which contract is against the wishes of the employees, also compels the employer to coerce employees in the exercise of their rights under Section 7, which is an unfair practice of an employer under Section 8(a)(1) but IS NOT an unfair practice of a labor union and thus NO CHARGES AT ALL can be filed against the labor union under the Labor Management Relations Act.*

To further accentuate the lack of remedy before the National Labor Relations Board, appellants refer to the recent decisions of the Board as pertaining to small businesses:

“Upon these facts, which are not contested, the Trial Examiner concluded that the employer was engaged in commerce within the meaning of the Act, and that the respondent’s (Union’s) activities had a close, intimate and substantial relation and tended to

lead to labor disputes burdening and obstructing commerce. It is clear to us, however, that the employer's business is essentially *local in nature* and *relatively small in size* and that the interruption of his operations by a labor dispute could have only the most remote and insubstantial effect on commerce. Recently we have dismissed several proceedings involving such enterprises, on the ground that the assertion of jurisdiction would not effectuate the purposes of the Act.

. . .

“Under Section 10 of the Act, as amended, the Board is ‘empowered’ to prevent any person from engaging in any unfair labor practice ‘affecting commerce,’ *but it is not directed to exercise its preventive powers in all cases.* . . .”

H. W. Smith, dba A-1 Photo Service, Local 905, Retail Clerks International Ass'n, AFL, 83 NLRB No. 86, Case No. 21-CB-34, May 13, 1949—reported at Labor Law Reports No. 8921.

See also:

Perura Studio, Portrait and Commercial Photographers and Photo Finishers Union, No. 24244 AFL, 83 NLRB No. 87, Case No. 21-CA 68.

The holding of the Board in the above cited cases only serves to further demonstrate the complete and total lack of remedy of the small businessman when he is embroiled with a large and aggressive labor union. While the Act appears to protect the small business person, as well as the large, it affirmatively appears that the Board may, at its discretion, *leave the small investor to work out his own*

fate as best he can. Such is the position of these petitioners. Each is presented, individually, with a labor contract. As demonstrated in the "Simons' case," *infra*, the small employer is at a complete loss to effectually combat such a powerful union, and each small employer can be easily forced into violation of the Act, as shown above.

Are these relatively small business people to be told, by this high and respected judicial body, that the purpose of the Taft-Hartley Act, and other labor legislation, was passed purely for the benefit of "big business" and "large labor unions"? Are these petitioners to be told that because their individual yearly gross is not in the million dollar category that they are precluded not only from the relief of the Board, but from the use of their own duly constituted courts? *In short, is there a dollar sign on justice?* Petitioners respectfully submit that such is not the position of this, or any other, court of this nation.

Then can it be said, within a reasonable construction of the English language, that these petitioners have not exhausted what was thought to be their remedy before the National Labor Relations Board? Is this instead not a situation where a union, by simply refusing to comply with the terms of the Act, successfully removes itself from jurisdiction of the Board, and attempts, by such process, to deprive its adversary of *any* remedy, contending that regardless of the employer's inability to seek relief before the Board, said employer is still precluded from any relief from our judicial bodies? Petitioners submit that this is precisely what respondents seek to do.

Respondents have submitted the previously mentioned contract to certain members of the Druggists' Association,

and asserts that it will present such a contract to each, every and all members, and that pressure will be brought to bear to force the employers to sign such contracts. Respondent unions contend that they have the right to insist upon these contracts, that the signing of such contracts, even though with a "non-complying" and "non-certified" union, would be valid. Petitioners insist, and it is submitted that they rightly do so, that the unions have no right to present such a contract, that an entry into such contract would constitute petitioner guilty of an unfair labor practice, and that respondent unions have no legal power to FORCE PETITIONERS INTO A VIOLATION OF THE NATIONAL LABOR RELATIONS ACT.

If there be any doubt in the mind of the court that a pharmacist is not a professional person, and a professional employee within the scope of the Act, it need but refer to the following reports from the National Labor Relations Board. The first report to be cited sets up the following:

"Definition: Section 2(12). Registered pharmacists employed at proprietary drug counters in department stores, as well as registered pharmacists employed in the prescription departments of the stores. *are professional employees within NLRA.....64,557.*

"Unit Appropriate: Section 9(b). Registered pharmacists employed both at proprietary drug counters and in the prescription departments of the department stores, may, if they so desire, constitute a separate unit notwithstanding their previous inclusion in

a broader unit inasmuch as they are professional employees within NLRA 64.557-65.77.” (Emphasis ours.)

Sam's Inc., 78 NLRA 104, 22 LRRM 1271.

Then, in the later NLRB decision cited below, the Board again reached an affirmative decision *in re* professional employees:

“Definition—Professional employees—Section 2 (12).

“Biological products manufacturing plants’ *chemists*, chemical engineers, bacteriologists, biologists, and physicists are professional employees within the amended NLRA 64.563-64.557.

“Unit appropriate Section 9(b). Biological products manufacturing plants’ professional employees may be severed from plant wide unit for purposes of decertification election. 64.563-64.557-65.16.” (Emphasis ours.)

In re Cutler's Laboratories, 80 NLRB 44, 23 LRRM 1077.

Thus it is shown that the Board has readily recognized pharmacists to be included within the definition of the Act as to professional persons *in a case where the problem could be put properly before it*. And having recognized the pharmacist as a professional person, there can be *no* doubt but that an employer would be held guilty of an unfair labor practice if he signed an agreement which forced such professional employees into a group composed of both professional and nonprofessional employees. It is

apparent that the *ultimate and nefarious purpose* of this union is to throw the burden of a violation of the Taft-Hartley Act upon the employers here petitioning for relief. By placing its entire economic and physical pressure upon the employer, thus leaving the employee group free from immediate restraint and free from any necessity to petition the Board (assuming without admitting such a petition would be heard), the respondent unions have placed themselves beyond the power of the Board to act. The union can force the employer into a violation of the Act by forcing this agreement here in issue upon employer, thus causing employers to *arbitrarily* force the professional employee into a *union not of his own choosing*. It is submitted that this power to force another person into violation of the laws of our nation is not a power which can, or will, be sanctioned by our courts.

Having, then, no remedy before the National Labor Relations Board, must each of some several hundreds of employer druggists, and each of further hundreds of professional employee pharmacists, wait until an unfair practice is committed, until each has suffered irreparable damages, before he may, *in an individual* suit, pursue *some* remedy for his grievances? It is respectfully submitted that the answer must be, and is, an unqualified no.

It has been shown that petitioners have no remedy before the Board, and that our state court (California) has refused jurisdiction. It has been further shown that upon failure of this court to declare the rights of the parties

herein, that hundreds of *identical* suits must be brought, and these suits *after the incurrence of irreparable damages*. Such a multiplicity of suits in itself presents a further reason, and a more impelling one petitioners could not point out, why this court should take jurisdiction.

Finally, the court should give serious consideration to what relief petitioners might avail themselves, if that remedy be not in declaratory relief. It should be ever in the court's mind that the employers who are represented by the petitioning Association *have not, nor have they ever, resisted the rights of their employees, professional or non-professional, to organize for purposes of collective bargaining*. These employers, to the contrary, are but making every effort to see that their employees are protected, as such employees have repeatedly shown their desire to be separated in regard to collective bargaining purposes, and to prevent these respondent unions from forcing said employers into violation of the Taft-Hartley Act.

Having shown the lack of a remedy before the Board for these purposes, petitioners proceed to their second major premise in support of the court's jurisdiction in this matter.

II.

This Is an Action Equitable in Nature, and Unless Specifically Excluded From the Jurisdiction of This Court, Jurisdiction Will Attach.

By Section 41 of the Judicial Code, subsection (1), as derived from Acts of March 3, 1911, Chapter 231, etc., the United States District Courts were given jurisdiction over suits of a civil nature, at common law or in EQUITY, setting out further jurisdictional requirements which have either already been mentioned herein, or will be mentioned subsequently. This section is cited as Title 28, Judicial Code and Judiciary 41(1). By Act of June 25, 1948, numbered Public Law 773, Chapter 646, and entitled "An Act to revise, codify, and enact into law Title 28 of the United States Code entitled 'Judicial Code and Judiciary,'" this said revision and codification was accomplished. However, it should be noticed and remembered that there is no mention made, or intent shown, to diminish or enlarge the equitable jurisdiction of the federal courts, but merely to revise and codify. Nor has it been shown by any subsequent case testing the jurisdiction of the courts that any diminishing or enlarging was contemplated.

To the contrary, the equitable jurisdiction has remained the same, and while it is acknowledged that the federal courts are courts of limited jurisdiction, IT IS SUBMITTED THAT THEIR EQUITABLE JURISDICTION IS GENERAL JURISDICTION, as is attested to by the following quotation and cited case:

"Section 11 of the Judiciary Act of 1789, 1 Stat. 78, provided that the circuit courts should have 'cognizance * * * of all suits of a civil nature at

common law or in equity' in cases appropriately brought in those courts. This provision is perpetuated in Section 24(1) of the Judicial Code, 28 U. S. C. 41(1), 28 USCA 41(1), which declares that the district courts shall have jurisdiction of such suits. The 'jurisdiction' thus conferred on the federal courts to entertain suits in equity is an authority to administer in equity suits the *principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.*"

Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U. S. 657, 59 S. Ct. 657.

And again in *Meredith v. City of Winter Haven* the court lays down the well established maxim:

"An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity."

Meredith v. City of Winter Haven, 64 S. Ct. 7.

It must be conceded that the equity jurisdiction of our federal courts is a general jurisdiction, and to be accorded to each plaintiff in line with the general principles of equity unless specifically precluded by some act or statute of the Congress of the United States.

Appellant proceeds, then, to these issues: (1) Does the National Labor Relations Act preclude the Federal District Courts from any original jurisdiction under any circumstance over the subject matter; and (2) if the District Court is not specifically precluded from taking jurisdic-

tion, may the said court, in exercise of its judicial discretion in equity, take equitable jurisdiction in the instant case?

It is plain that the Congress intended to channel the complaints of the private individual through the National Labor Relations Board in certain instances. However, those instances are set out in the Act, and inasmuch as the Taft-Hartley Act is an amendment to the Wagner Act, it may be construed to change only those provisions of the Wagner Act that are expressly changed. Section 10 of the amended Act sets out specifically those instances in which the private individual must pursue his remedies through the Board. The governing language of the Act is:

“Section 10(b), ‘Whenever it is charged that any person has engaged in or is engaging in any such *unfair labor practice*, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days before the service of said complaint.’”
(Emphasis added.)

It is readily apparent that such is not the purpose of this action, that no injunctive relief is being sought, that there is here no attempt to enjoin the defendants from any unfair labor practice, but to the contrary, that this is an action “seeking a Declaration of Rights, and an avoidance of liability, all within the ambit of the ‘Declaratory Judgments Act.’” NOT ONLY ARE PLAINTIFFS OUTSIDE

THE SCOPE OF THE NATIONAL LABOR RELATIONS ACT, BUT AS SHOWN IN PREMISE ONE, NO POWER TO GOVERN THE PRECISE SITUATION HERE INVOLVED WAS CONFERRED UPON THE NATIONAL LABOR RELATIONS BOARD. No other conclusion may be reached, then, but that Congress did not intend to preclude the private individual from the pursuit of his remedies through the courts other than in those specific instances enumerated in the provisions of the Taft-Hartley Act.

From that conclusion we are led, then, into the answer to the second question presented above, to wit:

“If the District Court is not specifically precluded from taking jurisdiction, may the said court, in exercise of its judicial discretion in equity, take cognizance of and confer jurisdiction upon the issues here presented by these petitioners?”

At this point, petitioners would once again like to recall to the attention of the court that this is an action for “Declaratory Relief” and, while governed by statute and the terms of the Judicial Code, it is nevertheless “*sui generis*,” or, in brief, “equitable” by nature, and within the sound discretion of the court as to its being granted or refused, PARTICULARLY WHERE THE NATURE OF THE CAUSE OF ACTION PARTAKES OF EQUITABLE PRINCIPLES. It is conceded that an action for declaratory relief need not, necessarily, be equitable, but it is equally contended that such an action may partake of the nature of an action in equity, and it is so contended here. It has been so held in many instances by this court, as witness the following line of cases:

“Plaintiffs correctly argue that a declaratory judgment suit is not a suit in equity. It does not logically follow however that certain equitable principles are without application in such suits. Such suits partake of the nature of both legal and equitable proceedings. It is usually denominated as ‘*sui generis*’ to indicate it is neither purely legal nor purely equitable. The true rule, I apprehend, is that when the proceedings partake of the nature of equity, it calls into play appropriate equitable principles.”

Buromin Co. v. National Aluminate Corporation,
70 Fed. Supp. 214, 216.

The Declaratory Relief Statute was similarly construed in the following case:

“ . . . The law created no new substantive rights or legal relationships but added to the *remedies* previously existing, an additional one for relief in the form of a judgment declaring, in cases of actual controversy, the rights of the parties. Though such relief was *inherent* in some situations previously, the statute extended the propriety of the procedure greatly, with the obvious intent to avoid delay and accrual of damages against one uncertain of his rights and to promote *an early adjudication* of the controversy between the parties without *waiting until one of them should see fit to begin suit for coercive relief after damages had accrued*. True it is that plaintiff might not invoke the court’s jurisdiction in a suit to recover Two Thousand Dollars (\$2,000.00) in money, *but this suit is for other relief*; it is in the nature of a suit to quiet title, by which equity juris-

diction is invoked in order to secure a decree of non-existence of apparent clouds upon one's title. So, here, plaintiff seeks to have the court remove any doubt as to the validity of the contract. In such a situation to exercise jurisdiction under the Declaratory Act is not to extend the jurisdiction of the court but merely to hasten the day when that jurisdiction may be invoked. . . ." (Emphasis added.)

Davis v. American Foundry Equipment Co., 94 F. 2d 441.

Referring again to the fact situation at hand, it is clearly shown that appellants' situation is very much the same as that in the above cited case. Here, there is a request that the court interpret a contract which the appellants are told they must sign. As before stated, appellants believe that if they are forced to sign such a contract in an attempt to prevent irreparable damages along one front, they will be forced into a violation of the Taft-Hartley Act, by which they may incur not only punitive action by the National Labor Relations Board, but civil damages by employees against whom they have been forced to commit an unfair labor practice. Appellants respectfully submit that even if we assume an action could be brought by these appellants before the National Labor Relations Board, that action could in no way relieve the employer, individually or collectively, from liability in any civil action brought by the employees, an action which accrues to them by virtue of the terms of the National Labor Relations Act. And since the National Labor Relations Act is the source of the right of the employees to maintain such a civil suit, it is clear that the jurisdiction of such

suit resides solely in the District Courts of the United States. *If the employer is to be brought before this Court to answer for any liability incurred by virtue of the terms of the National Labor Relations Act, it follows that this is the proper court to hear an action in Declaratory Relief flowing from that portion of the Act pertaining to the right of the employee to maintain a civil suit for damages.*

In further support of the foregoing citation, and argument of petitioners, the following citations are submitted:

“The Rules of Civil Procedure for the District Courts of the United States, in Rule 57, 28 U. S. C. A. following section 723c, which provides ‘the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.’ . . . The conclusion of the District Court that the bill must be dismissed because the Declaratory Judgment Act comprehends situations only where the plaintiff seeks to establish a right and not those wherein he seeks to escape liability, is founded upon a misconception both of its terms and purpose. . . . *its purpose is to provide a remedy to the challenger of a right, who otherwise could not have his challenge adjudicated until his adversary took the initiative.*” (Emphasis added.)

Employer's Liability Assur. Corp. Ltd. v. Ryan,
109 F. 2d 690, 691.

Then again the following language of the court is particularly in point, to wit:

“. . . The report of the Judiciary Committee of the Senate states that there is a discretion under

the statute not to issue the judgment if it will not finally settle the rights of the parties and, further, *that while the procedure is neither distinctly at law or in equity, but sui generis, the Supreme Court could probably at any time make rules under its equity power, if it saw fit.* . . . As said by Judge Knight in the case of *Automotive Equipment Co. v. Trico Products Corporation*, however, the discretion to grant or refuse the declaratory relief is a judicial discretion, and must find its basis in good reason, and is subject to appellate review in proper cases. We think that this discretion should be *liberally* exercised to effectuate the purposes of the statute and thereby afford relief from uncertainty and insecurity with respect to rights, status and other legal relations (See *Borchard, Declaratory Judgments*).” (Emphasis added.)

Aetna Casualty and Surety Co. v. Quarles et al.,
92 F. 2d 321, 324.

“. . . The Declaratory Judgment Act, 28 U. S. C. A. 400, we think, affords complainant a complete remedy. Under that Act, if there is a reasonable dispute between the parties as to application and interpretation of an Act of Congress or administrative order, either party has a right to resort to the District Court in an application for declaratory judgment. . . . The complainant need only show that his position is jeopardized by the statute, regulation, or order, and thereupon the court will afford relief from any uncertainties with respect to his rights. He is not required to wait indefinitely. The proceed-

ing has the advantage of escaping any technical distinction between law and equity and enables the court to reach the desired goal in the speediest and most inexpensive form. . . . Here, then, is congressional provision for a hearing at which complainant may have his rights determined by a court *endowed with jurisdiction.*" (Emphasis added.)

Gordon v. Bowles, Price Administrator, 153 F. 2d 614, 615, 616.

The import of the above cases cannot be escaped. Cases following the same reasoning and judicial line of thought are too numerous to set out in complete detail. The elements of declaratory relief, as presented in the above cases, and many others, are all present here. Appellants find themselves confronted with an Act of Congress that specifies certain things that appellants may not do, and in addition specifies certain things that appellants' adversary may not do. In addition, the Act enumerates certain instances in which a petitioner may not pursue his rights in the regularly constituted courts of the United States. All these things have been presented to the courts in the cases cited above, except that this "particular act of Congress has not been brought before the court on this question and on this type of factual situation." It cannot be doubted that an actual controversy is presented here, a controversy in which the two parties have placed different interpretations upon an Act of Congress, and upon a contemplated contract, and that appellants are faced with the dilemma of being forced into a violation of the law, a violation which appellants wish to prevent, and thereby seek this declaration of its rights and liabilities before this court. *Petitioners do not ask for a mere advisory*

opinion; they ask for a declaration of rights pertaining to their being compelled into a violation of an Act of Congress.

It thus can be seen that petitioners' cause presents all the long established requisites of equity, *i. e.*, no adequate remedy at law, irreparable damages which will be suffered if respondents be given the time and the opportunity to coerce and compel appellants to comply with their demands, plus the futility of attempting to proceed with any bargaining as long as the status of employees is in doubt, *and the interpretation of the Act of Congress in question is in such complete and hopeless conflict* between the parties. And further, an untold multiplicity of suits will result if each appellant is compelled to wait until an unfair practice has been committed against him.

It has been, we think, clearly shown by these appellants that while an action for Declaratory Relief is not purely equitable, it is equitable in nature, and that it is purely within the discretion of the court to grant or withhold the remedy. It is shown that there is more than a monetary amount in question here, and that the question presented is of great and pressing concern to the public, as well as to the appellants. As shown in premise number one, the appellants have exhausted their remedy before the National Labor Relations Board; that, in fact, there was and is *no remedy* in the factual situation which confronts us here, and it is shown in premise number two that the National Labor Relations Act does not specifically preclude the Federal courts from taking jurisdiction, but instead confers jurisdiction on the Board only in those instances which are set out in the ACT in its amending qualities to the previous Wagner Act.

III.

Every Element and Requisite of Jurisdiction in the Federal Court Is Present.

It has already been set out that every requisite element for Declaratory Relief exists in this case. The Declaratory Judgment Act sets out that in order to obtain this remedy in the Federal Courts the petitioners must still show all the requisites of jurisdiction necessary in any other action before the court. Thus, in cases involving the interpretation of a Federal Statute, or a Federal question, the showing of the presence of a disputed monetary amount is also required, to wit: "Three Thousand Dollars (\$3,000.00)." The presence of the interpretation of a Federal Statute, and the like presence of a Federal question, has been shown and is obvious. It remains, then, only to show whether or not this is a case in which the specified amount is required and, if it is, does such an amount exist here?

Before proceeding with a "yes" or "no" answer to this premise, appellants would like to call to the attention of the court again the source and derivation of the jurisdictional power of the Federal Courts sitting in equity.

". . . Equity jurisdiction, of course, is a basis for action of realm of power dependent upon chancery precedents of long standing and to which recourse must still be had to determine whether any relief can be granted in a particular situation. There can be no question, however, under the phrasing of the constitutional provision as to judicial power and the

language of the congressional grant of jurisdiction to the district courts, that they have such jurisdiction or power; and, when they decline requested relief of an equitable nature, it is not for want of power but because the facts or equity precedents do not warrant it."

Vol. 1, Cyc. of Federal Procedure, Sec. 133 at p. 325.

Now we find that from time to time the courts have been presented with cases in which there is no direct monetary dispute involved, but which will result in extended litigation and in which the legal remedy is inadequate, and from which resulting irreparable damages can readily be foreseen. From these types of cases there has arisen considerable precedent for allowing jurisdiction in certain cases, in exercise of the court's discretion, to prevent the results enumerated above. The majority of these types of cases have been injunctions, habeas corpus cases, divorce or matrimonial causes affecting *personal status*, and other equitable matters. It is readily apparent that these classes of cases have been accepted by and under the exercise of the sound discretion of the court, and *not from any absolute ascertaining of the existence of a monetary amount*. For reference to cases of this nature, the court is referred to *DeKrafft v. Barney*, 17 L. Ed. 350; *Bowman v. Bowman*, 30 Fed. 849, and *Stone v. Christensen*, 36 Fed. Supp. 739. IT IS IMPORTANT TO NOTE THAT THE REQUISITE JURISDICTIONAL AMOUNT IS NOT WAIVED IN THESE CASES, BUT DUE TO THE NATURE OF THE CASE, THE DECLARATION

OF THE RIGHT IS CONCEDED TO BE WORTH THAT REQUISITE
AND MORE.

That reasoning may so very well be applied to the facts at hand. It is easy to see that a controversy involving sums in excess of the jurisdictional amount is in controversy here. While perhaps difficult to ascertain in precise dollars and cents, it is readily seen from examination of the Taft-Hartley Act that if the appellants are forced into execution of this contract in issue, said appellants, and each of them, will be in violation of that Act. The resultant claims of injured employees, the potential prosecution by the National Labor Relations Board itself, and the cost of such litigation, PLUS THE LOSS INCURRED BY EXERCISE OF ECONOMIC PRESSURE EXERCISED BY THE RESPONDENT UNIONS, will in each individual case amount to much more than the jurisdictional amount in issue. Petitioners would refer the court once again to Vol. 1, Cyc. of Federal Procedure, Section 143, at page 343, and to these words:

"The amount in controversy in any case depends upon the nature of the particular case. In many cases, particularly with respect to liquidated demands, the amount is obvious; in others, it is difficult of determination, either by reason of the nature of the relief sought or inherent uncertainty in terms of money as to the effect any judgment entered will have, as in the case of injunction suits to protect rights from invasion. The test laid down in an early case by Chief Justice Ellsworth that 'where

the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the rule, the legal cause of action, and not the plaintiff's demand, must be regarded' is helpful, but by no means a complete guide. It comes down merely to stating that if the amount in controversy or value of property or rights involved is obvious or such as to be ascertainable as a matter of law, jurisdiction will be determined on that basis without regard to plaintiff's allegations that more than \$3,000.00 is involved until the contrary appears." (Emphasis added.)

It cannot be reasonably said that the *contrary* appears here, and certainly the respondents have not shown that it is so, which the burden is upon them so to do if they can. Appellants submit then that this is a case, by its nature, which does not require the showing of a monetary amount to invoke the jurisdiction of the Federal Courts, and further submit that even if such requisite amount should appear to be necessary, that the presence of such amount in controversy is incontrovertibly shown.

IV.

There Is Certain Inherent Jurisdiction, Even in This Court of Delegated Powers, and Petitioners Present a Case Within the Scope of That Inherent Jurisdiction.

It is often argued, and was so argued by the eminent Justice of the District Court at the hearing of the Motion to Dismiss in the present case, that the Federal Courts are without any vestige of inherent jurisdiction. It is submitted that such is not true, that such was not intended to be true, and that such could not be true and be in keeping with the tradition and policy of the courts of these United States. It is true that Congress has delegated certain fields to the Federal Courts, and in certain instances have specifically set forth just what jurisdiction the Federal Courts may take. BUT THOSE INSTANCES ARE CONFINED TO THE SPECIFICATIONS OF THE PARTICULAR ACT OR STATUTE SETTING THEM FORTH, AND NOT TO THE ENTIRE JURISDICTION OF THE COURTS.

By the prior showing herein set forth, petitioners have shown that this action, being one of "Declaratory Relief," is, by nature of the case, equitable. Being such an action, it can hardly be argued that there are not certain *inherent* qualities of jurisdiction existing within the District Court. In light of some of the prior cases discussing the question of inherent jurisdiction in the Federal Courts, these petitioners question the reasonableness of any argument that such jurisdiction does not exist. Limited in its scope, yes,

but a nullity, no. In discussing the jurisdiction of the Federal Courts, Volume 1, Cyc. of Federal Procedure, Section 62, pages 115-116, uses the following language:

“ . . . The jurisdiction of all Federal courts is limited to that which is specially conferred on them, and they are not possessed of the powers inherent in courts existing by prescription or by the common law. NEVERTHELESS, THEY ARE NOT INFERIOR COURTS IN THE GENERAL SENSE, AND WITHIN THEIR LIMITATIONS ARE COURTS OF GENERAL JURISDICTION, AND BEYOND THEIR LIMITED EXPRESS POWER AND JURISDICTION THE FEDERAL COURTS HAVE SUCH INHERENT OR IMPLIED POWERS AS PERTAIN TO THEIR CHARACTER AND GENERAL JURISDICTION AS LIMITED.”

The language from the following case is in complete support of the above citation:

“As we have already seen, and as has been many times declared by this court, the equitable powers of the courts of the United States, sitting as courts of law, over their own process, to prevent abuse, oppression, and injustice, are inherent, and as extensive and efficient as may be required by the necessity for their exercise, and may be invoked by strangers to the litigation as incident to the jurisdiction already vested, without regard to the citizenship of the complaining and intervening party.”

Now it is apparent to these appellants, as to the court, that the above case is a case especially concerning “process.” (*Pueblo de Taos v. Archuleta et al.*, 64 F. 2d

807, 813.) However, it cannot be reasonably construed that the word "inherent" is meant to apply only to "process," or that such a case is the only time when the Federal Court sitting in equity, in the sound exercise of its discretion, may use its *inherent power*. To the contrary, it must follow, that such inherent power is meant to say exactly what the Honorable Court has said in the above cited case, to wit:

"That the power is to be exercised to prevent abuse, injustice, oppression, and violation of Federal Statutes, and when it is shown that the remedy at law is inadequate, that irreparable damages will result, and that property interests will be violently and unjustly affected, then, in the sound discretion of the court, it will exercise this inherent power to the prevention of these oppressive and unjust acts."

As to what will constitute such a case depends on the peculiar facts of the individual case, and it is respectfully submitted, that over and above the jurisdictional facts previously set forth, this constitutes a vital factor in the matter here under consideration, and is one additional reason why the court should exercise jurisdiction in this case. Always before the people of this country, and the Justices of this Nation's courts, should remain this maxim: "EQUITY ADMITS OF NO WRONG WITHOUT A REMEDY." Unless our judicial system continues to be founded on this unimpeachable maxim of equity, then there is little hope for the statutory-ensnared citizen of our Nation.

Conclusion.

Petitioners have shown that in fact there was no remedy before the National Labor Relations Board in this matter, and that an attempt to persuade the Board to confer jurisdiction on the matter was met with rebuff; that this is an action for Declaratory Relief and, as such, in this particular situation an action of equity, and an action not specifically precluded from the court by the National Labor Relations Act conferring jurisdiction on the Board in specific instances; that every element of jurisdiction required by the Federal Courts is present in the matter, and that further, certain of these elements are not requisites in this particular case, and that the Federal Courts have certain inherent jurisdiction, which is applicable to situations of this type, and which should be exercised for the maintenance of the repute of the court in the eyes of the Nation's citizenry, and which has been so often exercised in similar instances of oppression in the past.

Since the employer is in the position whereby a right of action for civil damages will accrue to each individual employee whether or not the contract in question is signed, and whether or not an action could be prosecuted through the "Board," it follows that Declaratory Relief is the only remedy, and that this is the only proper court to hear and give such remedy.

It is respectfully submitted that no appellant was ever more justifiably before this court, that no appellant has been better qualified for the exercise of this court's jurisdictional qualities, and that such requisite elements of jurisdiction has been established beyond any reasonable doubt.

J. WESLEY CUPP,

Attorney for Appellants.

No. 12273
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA RETAIL DRUGGISTS ASSOCIATION,
LTD., a non-profit corporation, etc., *et al.*,
Appellants,

vs.

RETAIL CLERKS UNION, LOCAL No. 770, an unincorporated
association, etc., RETAIL CLERKS UNION, LOCAL No.
324, an unincorporated association, *et al.*,
Appellees.

APPELLEES' BRIEF ON APPEAL.

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324, an unincorporated association, *et al.*,

Appellees.

APPELLEES' BRIEF ON APPEAL.

Introduction.

Appellants in this proceeding below filed an action for a declaratory judgment seeking a ruling that certain proposed contracts alleged to have been presented by the appellee labor organizations contained provisions which were unlawful under the Labor Management Relations Act of 1947 (29 U. S. C., Sec. 141 *et seq.*), and a further ruling that an exercise of the right to peacefully picket to induce appellants to sign such contracts would be unlawful and an unfair labor practice under said Act. This action was dismissed upon motion of the appellees by the United States District Court upon the grounds that the court does not have jurisdiction to entertain the action. (Order Dismissing Action for Want of Jurisdiction, United States District Court, Southern District, March 29, 1949.) Thereafter, the present appeal was taken.

Issues.

Stated briefly, the *primary issue* before this court is whether the court has jurisdiction over a matter in which the Labor Management Relations Act of 1947 (29 U. S. C., Sec. 141 *et seq.*), gives exclusive jurisdiction to the National Labor Relations Board. This is the main consideration involved herein and the basis upon which the United States District Court ruled that the cases could not properly come before it.

Other issues, minor in character, raised by appellants will also be considered. These issues are:

1. Does the Federal Declaratory Judgment Act apply herein?
2. Have the elements of Federal jurisdiction been met in this proceeding?

Summary of Arguments.

The District Court properly dismissed appellants' action for lack of jurisdiction. The National Labor Relations Board has *exclusive* jurisdiction to hear and determine cases alleging the commission of unfair labor practices as defined by Title I of the Labor Management Relations Act of 1947. The courts, both Federal and State, are absolutely without jurisdiction to redress by injunction *or otherwise* the unfair labor practices defined by the Act at the instance of a private party, as distinguished from the Board. Appellants' complaint prays judgment that appellee unions be declared in violation of Sections

8(b)(1)(A), 8(b)(2) and 8(b)(4)(A) of the Act and accordingly, the District Court did not have jurisdiction.

Appellants' action is a sham and frivolous one for the reason that although their complaint is based upon allegations that certain acts constitute unfair labor practices, appellants' brief (p. 8) expressly admits that *no* unfair labor practices have been committed.

Even assuming that unfair labor practices have been committed appellants openly admit that they have neither commenced nor exhausted the appropriate administrative remedy before the National Labor Relations Board and for this reason appellants have no cause for relief before a Federal Court.

The filing of the documents required of labor organizations by Section 9(f)(g) and (h) of the Labor Management Relations Act is *not* a prerequisite to an unfair labor practice charge by an employer, and appellants are therefore not deprived of their administrative remedy as they seem to allege.

The complaint of appellants presents a hypothetical state of facts which appellants assume will take place in the future, and asks the court for an advisory opinion regarding same. The case does not present an actual case or controversy upon which a judgment can define the rights of the parties and redress their wrongs.

None of the essential elements prerequisite to the exercise of federal jurisdiction, such as diversity of citizenship, jurisdictional amount in controversy, or statutory authority, are set forth in the complaint below.

ARGUMENT.

I.

The National Labor Relations Board Has Exclusive Jurisdiction to Determine Whether or Not Unfair Labor Practices Have Been Committed.

The District Court below was unquestionably correct in its decision to dismiss on the grounds that it lacked jurisdiction to entertain this proceeding. In substance appellants have alleged that the acts of appellees might constitute unfair labor practices under the Labor Management Relations Act of 1947. They have sought access to the Federal District Court to secure an advisory determination of unfair labor practice charges rather than to proceed directly to the National Labor Relations Board which is the administrative body expressly established to hear such charges in the first instance, as by Section 10(a) of the amended National Labor Relations Act provided.

In *Amazon Cotton Mill Co. v. Textile Workers Union of America* (decided April 1, 1948, C. C. A. 4th), 167 F. 2d 183, a labor union charged an employer with an unfair labor practice for the reason that the employer refused to bargain with the union. The union asked for an injunction requiring the employer to bargain and also for an award for damages. The employer moved to dismiss the suit for lack of jurisdiction in the court. The National Labor Relations Board was allowed to intervene, and the Board moved to dismiss on the ground that it had exclusive jurisdiction of the controversy.

The court held that the National Labor Relations Board was and remains with exclusive jurisdiction to determine whether or not unfair labor practices have been committed

and to afford relief against the continuation of such practices.

The Federal District Courts are without jurisdiction to redress by injunction or otherwise the unfair labor practices defined in the Labor Management Relations Act.

The aforementioned Section 10(a) of the Act provides that:

“The Board is empowered as hereinafter provided to prevent any person from engaging in any unfair labor practices (listed in Section 8) affecting commerce.”

In the case of *Bakery Sales Drivers Local Union v. Wagshal*, 333 U. S. 442, the Supreme Court declared:

“ . . . the law has been changed only where an injunction has been sought by the National Labor Relations Board, not where proceedings are instituted by a private party.”

Thus we find that the Supreme Court in the quotation above cited affirms the proposition that a private party's exclusive remedy in matters involving unfair labor practices is with the National Labor Relations Board.

The Amazon Cotton Mill case clearly affirmed the exclusive jurisdiction of the National Labor Relations Board over unfair labor practice cases.

Quoting from the *Amazon* case:

“We think it clear that the *District Court had no jurisdiction of the case.* Unless the Labor Management Relations Act of 1947 has had the effect of clothing each of the more than two hundred District Judges of the country with the powers over unfair labor practices vested in the National Labor Relations Board, and in addition the effect of virtually

repealing the provisions of the Norris-LaGuardia Act limiting the use of injunctions in labor cases, the injunction granted by the lower court cannot be sustained. We do not think that the Labor Management Relations Act was intended to have or does have that effect."

Quoting further from the *Amazon* case, the Court of Appeals there held that the District Court did *not* have jurisdiction, stating that it was—

" . . . perfectly clear, both from the history of the National Labor Relations Act and from the decisions rendered thereunder, that the purpose of that Act was 'to establish a single paramount administrative or quasi judicial authority in connection with the development of Federal American law regarding collective bargaining'; that the only rights made enforceable by the Act were those determined by the National Labor Relations Board to exist under the facts of each case; and that *the Federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined.*"

The court in the *Amazon* case held that the Taft-Hartley Act was passed for the purpose of providing a complete and exclusive forum for the investigation, hearing and settlement of controversies over acts deemed to be unfair labor practices affecting interstate commerce.

Congress has provided in the Labor Management Relations Act a special administrative agency for the exclusive administration of a law which regulates in detail the conduct of labor management relations. Therefore, neither a United States District Court nor a State has any legal right to infringe upon the exclusive jurisdiction of the National Labor Relations Board by entertaining an action

brought by a private party to prevent alleged "unfair labor practices" of employers or unions. The National Labor Relations Board was and remains with exclusive jurisdiction to determine whether or not unfair labor practices have been committed and to afford relief against the continuation of such practices. The Federal District Courts are without jurisdiction to redress by injunction *or otherwise* the unfair labor practices defined in the Labor Management Relations Act.

Amazon Cotton Mill Company v. Textile Workers of America (C. C. A. 4th, 1948), 167 F. 2d 183.

II.

Many Other Recent Decisions, Both Federal and State, Support the Proposition That the National Labor Relations Board Has Exclusive Jurisdiction in Unfair Labor Practice Matters.

The case of *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Dixie Motor Coach Corporation* (C. C. A. 8th, Nov. 26, 1948), 170 F. (2d) 902, reversing the United States District Court for the Western District of Arkansas, was an action brought in the Federal District Court by the Dixie Motor Coach Corporation against the defendant union to obtain an injunction against the establishment and maintenance by the union of a picket line around the bus depot operated by the plaintiff. This picket line was maintained because the plaintiff was doing business with a certain motor carrier. The trial court issued a permanent injunction against the defendant labor union. Defendant appealed and the National Labor Relations Board moved for

leave to intervene, pointing out that the Board has exclusive jurisdiction to remedy the violations complained of. The Court of Appeals found that the District Court was in error and that Section 10(1) of the amended Act authorizes injunctive relief against the conduct described in Section 303 only upon the petition of the National Labor Relations Board. The Act neither expressly or impliedly authorizes a suit by a private party for injunctive relief against such conduct. *A Federal District Court has no inherent power to grant relief against such conduct in a suit brought by a private party.*

In *International Longshoreman's & Warehouseman's Union v. Sunset Line and Twine Co.* (U. S. District Court in the Northern District of California, April 8, 1948), 77 Fed. Supp. 119, it was stated that in a situation where the union was seeking an injunction and damages because the employer refused to bargain with the union after having done so for ten years, that the National Labor Relations Board has exclusive powers to determine unfair labor practices.

Also in the case of *Gerry of California v. Superior Court*, 32 Cal. (2d) 119, 194 P. (2d) 689, (decided by the California Supreme Court June 16, 1948), the court followed the same line of reasoning as the Federal cases above cited. In that case there was an attempt to force the Superior Court to assume jurisdiction by a writ of mandamus. The Gerry Company manufactured women's clothing and 80% of its business was in interstate commerce. The union involved attempted to organize the

company's employees. All but one of the employees filed a petition for election and certification with the National Labor Relations Board, and the company consented to the election. The uncertified union then instituted a picket line. No complaint was filed by the company with the Board, but a complaint was filed with the Superior Court for an injunction and damages. This was refused on the grounds that the Board had exclusive jurisdiction, and that the State courts were entirely without jurisdiction in the matter.

In re DeSilva, 33 A. C. 44 (decided November 16, 1948), which is the forerunner to the instant proceeding before this court, was a case in which the attorney for the appellants herein made his first attempt to evade the jurisdiction of the National Labor Relations Board by attempting to utilize the State courts. Having failed there, counsel is now attempting to utilize the Federal courts for the same purpose through the novel approach of a complaint for Declaratory Judgment. In that case the Sureway Drug Company employed two pharmacists and eight clerks who were not organized into any labor organization. When the union subsequently began to organize these employees, and secured representation authorization cards from a majority of them, the company discharged such employees and refused to sign the collective bargaining agreement proffered by the union. Thereupon the union commenced to picket. Subsequently the company petitioned the Board for certification of the union as the representative of the employees, but the petition was dismissed on the grounds

that the union was not in compliance with Sections 9(f)(g) and (h) of the Act. Action was filed by the Drug Company in the Superior Court to enjoin the picketing and for damages, and the court issued a preliminary injunction. When picketing continued, DeSilva was convicted of contempt of court. The Supreme Court upon review of this judgment on application for a writ of habeas corpus held that the sole purpose of the lawsuit was to obtain equitable relief for an object declared unlawful under the National Labor Relations Act. The court reaffirmed the *Gerry* doctrine above cited that:

“the declared intent and purpose of the Labor Management Relations Act of 1947 was to vest exclusive jurisdiction in the National Labor Relations Board over unfair labor practices, affecting interstate commerce . . .” and “. . . the Act deprived the Superior Court of original equitable jurisdiction in such cases.”

It was further held that:

“No distinction could be made here because the National Labor Relations Board had denied the company’s petition for certification of a union representative. By the denial the Board did not divest itself of jurisdiction to determine whether the defendants were committing unfair labor practices affecting interstate commerce, which could be enjoined pursuant to the procedure provided by the Act. Its exclusive jurisdiction over that matter had not been invoked by the plaintiff.”

III.

Appellants' Complaint Is Based Upon Alleged Unfair Labor Practices by Appellee Unions But Appellants' Brief Declares No Unfair Labor Practices Have Been Committed.

Paragraphs XVIII, XIX and XXIII of the appellants' complaint definitely allege the commission of unfair labor practices on the part of the appellee unions herein as well as do the demands that they be declared guilty of such practices, in paragraphs 3, 4 and 8 of the prayer in the aforementioned complaint.

Section 10(a) of the Labor Management Relations Act of 1947 gives exclusive jurisdiction to the National Labor Relations Board over such alleged unfair labor practices as heretofore cited in this brief and as further borne out by the decisions quoted above.

Appellants' position before this court can only be described as peculiar. In their prayer for declaratory judgment they ask that the unions be declared guilty of acts constituting unfair labor practices, but on page 8 of their brief they declare that no unfair labor practices have been committed.

If there have been no unfair labor practices then indeed the complaint is utterly sham and frivolous. If however, as is the fact, the entire complaint is based upon allegations of unfair labor practices, then appellants have failed to exhaust their administrative remedies and therefore have *no* standing before any court, Federal or State, as the courts are without jurisdiction. In addition to the cases already quoted, appellees cite, *Meyers v. Bethlehem Steel*, 303 U. S. at 50-51; *Newport News v. Schauffer*, 303 U. S. 54, to support their position.

IV.

The Federal Act Does Not Make the Filing of the Documents by Labor Organizations a Prerequisite to the Exercise of Jurisdiction by the Board on a Charge of Unfair Labor Practices.

The reasoning in the case of *International Longshoreman's & Warehouseman's Union v. Sunset Line & Twine Company*, 77 Fed. Supp. 119, is *apropos* to the contention of the appellants herein.

Quoting from that case:

"It is equally clear that the Board has exclusive power to determine whether unfair labor practices have been committed and to issue appropriate orders upon such determination . . . Plaintiff would have this court discover jurisdiction by implication. The complaint sets forth no particular section of the Act upon which reliance is placed. It is broadly alleged that plaintiff is engaged in interstate commerce and that unfair labor practices have been perpetrated by defendants."

The court quoting out of *Styles v. Local 74 etc.*, 74 Fed. Supp. 499, said:

"This tribunal has no jurisdiction to settle the controversy between the contesting parties. The Congress has seen fit to place jurisdiction with the National Labor Relations Board and thereafter by adequate procedural provisions in the Circuit Court of Appeals and the Supreme Court."

The plaintiff in the *Longshoreman's* case further asserted:

"It must have been the intent of Congress that if the labor organization chose not to avail itself of the facilities of the National Labor Relations Board be-

cause it preferred not to file the affidavits and documents required, then another forum should be provided where the employers unfair labor practices could be subject to scrutiny and restraint.”

The court said:

“This latter contention on the part of plaintiff has some degree of novelty, but cannot be accepted as a canon of interpretation or construction either with respect to the intent of the legislators or as to the wisdom or purposes of the Act . . . It is manifest that plaintiff has not seen fit to invoke the jurisdiction of the National Labor Relations Board in the manner clearly provided for. This suit represents a circuitous method or means of avoiding or attempting to avoid the clear mandate of the statute. To say that the United States District Courts, under such circumstances, have concurrent jurisdiction is to create therein a forum for every conceivable labor management grievance which properly reposes within the confines, province and exclusive jurisdiction of the Board.”

It was observed in the *Gerry* case, *supra*, that since the Federal Act *does not make the filing of documents by labor organizations a prerequisite to the exercise of jurisdiction by the Board* on a charge of unfair labor practices presented by the employer, *there is no inadequacy of the available administrative remedy* merely because of the failure of the union to file the documents.

It is sufficient to note that in connection with the above that an inspection of the appellants' complaint and brief will divulge a pursuance of the techniques relied upon by the unsuccessful parties in the *Longshoreman's* and *Gerry* cases.

V.

**The Appellants Have Misquoted and Misstated
Certain Cases Cited by Them.**

Appellants cite on page 8 of their brief the cases of *Rice & Holman v. United Electrical Workers*, 16 C. C. H., Labor Cases, Par. 65,087, N. J. E., (decided March 30, 1949), and *Int'l Union United Automobile Workers, A. F. of L., Local 232 v. Wisconsin Employment Relations Board*, 336 U. S. 245, 93 L. Ed. Adv. Op. 510 (decided February 28, 1949), to support their contention that the employers should be able to obtain declaratory relief in this situation. Each of these cases concern themselves with issues wholly foreign to the instant proceedings. In the *Rice & Holman* case the picketing was enjoined at the same time that an unfair labor practice charge was pending with the Board. However, the court in that case found as a fact that the pickets had indulged in violence, abusive and foul language, blocking of entrances, and massing of pickets. Such conduct is subject to restraint and is separate and distinct from the question of any unfair labor practice under the Act. Unfair labor practice charges are within the exclusive jurisdiction of the National Labor Relations Board. There is absolutely nothing in the instant case at all comparable. In fact, as admitted by the appellants, there has been no picketing of their drug stores at the time of the bringing of this action, and of course, no violence or other unlawful conduct.

The other case cited, *Int'l Union United Automobile Workers, A. F. of L., Local 232 v. Wisconsin Employment Relations Board* is completely distinguishable from the case presented herein by the appellants. The facts in the cases are not even remotely related. The *Wisconsin*

case was a case in which the State of Wisconsin had enacted a State labor law prohibiting certain kinds of work stoppages and concerted activities. The court there held that the Labor Management Relations Act did not preclude the State from exercising police powers and regulating the conduct of certain intrastate labor relations based upon a Wisconsin law even though the conduct did affect commerce. There is no comparable California law, and the appellants herein in fact have based their entire case upon the Federal Labor Act.

VI.

Appellants' Complaint and Brief Are at Variance in That the Complaint Alleges Commerce as Jurisdictional Grounds and the Brief Argues That Appellants Are "Small Businessmen" Not Affecting Commerce.

As a further argument supporting their contentions that the District Court has jurisdiction because they have no administrative remedy, appellants declare that because they are "small businessmen" the National Labor Relations Board will refuse to take cognizance of their charges as their activities do not affect commerce and it would not effectuate the purposes of the Act, citing the cases of *Matter of H. W. Smith, d/b/a A-1 Photo Service*, 83 N. L. R. B. No. 86 (decided May 13, 1949), and *Matter of Fred Montgomery, d/b/a Pericra Studio*, 83 N. L. R. B. No. 87 (decided May 13, 1949). Are we to regard the appellants' allegation in their complaint that they are in interstate commerce? Or, are we to regard the argu-

ments in appellants' brief that they are not in commerce? *Appellees submit that this is most confusing, not knowing which allegation to answer.*

If it is true, as argued in the brief, that they do not effect commerce, and that it would not effectuate the purposes of the Act for the Board to take jurisdiction, appellants have stated themselves out of court. Their entire complaint is based upon their allegations that defendant unions attempted to force them to violate the Act. Specifically they contend that defendants tried to force them, to place professional employees in a bargaining unit with non-professional employees in violation of Section 9(b)-(1); that defendants attempted to force them to violate Section 8(a)(3); and that defendants violated Sections 8(b)(1), 8(b)(2) and 8(b)(4)(A) of the Act.

If appellants are not covered by the provisions of the Act because their activities are too remote and insubstantial to have an effect upon commerce, then none of the alleged acts of defendants could possibly have been in violation of the Act or any other State or Federal law, and therefore, appellants have no cause of action or case for relief. Simply stated, if appellants are correct that they are not covered by the Act, then defendants have done no wrong.

VII.

**The Federal Declaratory Judgments Act Is Not
Applicable to the Situation Herein.**

It is elementary that the Declaratory Judgments Act does not enlarge the jurisdiction of the Federal courts. Congress has provided for the matters over which the Federal courts take jurisdiction, and it has likewise outlined the jurisdiction of the National Labor Relations Board.

Before the Act will apply there must be an actual case or controversy shown. The courts will not render an advisory opinion; and further, one of the usual bases of jurisdiction must be shown to exist. (Constitution of the United States, Art. III; *Muskrat v. United States*, 219 U. S. 346; *Putnam v. Ickes*, 78 F. 2d 223; *Continental Casualty Co. v. National Household Distributors*, 32 Fed. Supp. 849.)

The danger or dilemma of the appellants must be present, not contingent upon the happening of hypothetical future events,—although it may involve future benefits or disadvantages—and the prejudice to his position must be actual and genuine and not merely possible or remote to entitle appellant to the rendition of a declaratory judgment. (Borchard, *Declaratory Judgments*, p. 56.)

The entire action here is based upon assumed and hypothetical possible future occurrences, none of which are in actual fact endangering or threatening appellants at this time. Appellants present to this court a hypothetical state of facts which supposedly will exist in the future, and ask this court to rule that *if* these facts did exist that the

unions would have committed unfair labor practices and that the contracts would be unlawful. In other words there is no existing case or controversy upon which the court may exercise its proper judicial functions.

It is also a long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. (*Meyers v. Bethlehem Steel Corp.*, 303 U. S. at pp. 50-51.) Further, it has been held that the Declaratory Judgment Act should not be used procedurally for the purpose of selecting a forum. (*Commercial Casualty Ins. Co. v. Fowles*, 154 F. (2d) 884.)

Appellants herein seek to avoid the clear holdings of the *Amazon Cotton Mills*, *Dixie Greyhound Bus Lines*, *International Longshoreman's Union* cases, *supra*, among others, that Federal courts have no jurisdiction of actions alleging the commission of unfair labor practices by a novel attempt to bring their action under the Declaratory Judgments Act. Both Federal and State court decisions have repeatedly denied injunctive relief in such situations, both because of the provisions of the Norris-LaGuardia Act and because the National Labor Relations Board has exclusive jurisdiction.

The Declaratory Judgments Act does not enlarge the jurisdiction of the Federal courts. If these courts have no jurisdiction of an alleged cause for relief by injunction, they cannot accomplish the same result by declaratory relief. A declaratory judgment must be denied appellants for the same reasons that injunctive relief would be denied.

We call the court's attention to the language of *Davis v. American Foundry Equipment Co.*, 94 F. (2d) 441, quoted

in appellants' brief, construing the Declaratory Judgments Act, wherein it was stated by that court that:

“ . . . to exercise jurisdiction under the Declaratory Act is *not to extend* the jurisdiction of the court, but merely to hasten the day when that jurisdiction may be invoked . . . ”

It is fundamental that there must be Federal jurisdiction before any remedy may be asked of the court, and if the court lacks jurisdiction, as it clearly does in regard to unfair labor practice controversies, then no form of Federal action is available save the appropriate administrative proceedings.

VIII.

The Elements of Federal Jurisdiction Have Not Been Met by Appellants.

There is no showing by appellants herein that the jurisdictional amount of \$3,000 exclusive of interests and costs usually required before the Federal Courts will consider a Federal question, has been met. Nor is there a showing of diversity of citizenship, nor the fact that such jurisdiction is secured pursuant to a Federal Statute.

The amount in controversy must be measured by the pecuniary consequence to either party to an action. (*Thompson v. Gaskill*, 62 Sup. Ct. 673.) Here there is neither a case or controversy nor is there a showing of pecuniary damage to the appellants. The pecuniary result which measures the presence or absence of the jurisdictional amount must be such as will be directly produced

by the litigation. (*Ronsia v. Denver*, 116 F. (2d) 604.) There being merely a reliance upon the possibility of hypothetical future events occurring, and the instant request for declaratory relief being merely advisory in nature, there is obviously no jurisdictional amount here involved. If the matter in controversy is not solely ascertainable in money it must be capable of being valued in money.

As was pointed out in *New York Life Insurance Co. v. Johnson*, 225 Fed. 958, and in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U. S. 283, it is not the amount claimed in the prayer for relief which determines the jurisdiction of the court, if the unmistakable fact and the legal certainty is that the plaintiff could not have had any reasonable expectation that plaintiff could recover, exclusive of interest and costs, an amount within the jurisdiction of the court.

Further to be considered briefly here and worthy of only a short discussion is the appellants' argument that the courts shall assume equitable jurisdiction. It is basic and axiomatic that equity will never assume jurisdiction unless the law does not afford an adequate remedy. Here the Labor Management Relations Act clearly provides for a remedy in Section 10(a) of that Act.

Moreover, in view of the statutory character of the United States District Courts, there can be no serious contention made for the assertion of a supposed "equitable" jurisdiction, absent the essential elements of Federal jurisdiction prescribed by Congress.

Conclusion.

Appellants came before the District Court below with a request that the court declare certain alleged acts to be unfair labor practices as defined by Title I of the Labor Management Relations Act of 1947.

It is unquestionable that appellants brought their proceeding before a court that lacked jurisdiction to hear the cause. Appellants failed to avail themselves of the administrative remedies provided for such cases before the National Labor Relations Board. In an unbroken line of cases, cited by appellees herein, namely, the *Amazon Cotton Mills* case, *Dixie Motor Coach Co.* case, *International Longshoreman's* case, *Bakery Sales Drivers* case, *Gerry* case and the *DeSilva* case, both Federal and State courts have clearly ruled that the National Labor Relations Board has exclusive jurisdiction to hear in the first instance, charges by private parties of the commission of unfair labor practices. Each of these decisions denied relief to private parties on the grounds that the courts did not have jurisdiction. Appellants' cause falls squarely within the rule of these cases and the dismissal below was proper and legally correct.

Evidently realizing this basic weakness in their case appellants devoted their entire brief and argument to an attempt at establishing the alleged existence of factors which might be considered reasons for the courts taking jurisdiction regardless of the rule as set forth by appellees.

Appellants first claim that they have no remedy before the Board. To substantiate this claim they cite a dismissal of an employer petition for certification of a union because the union was not in compliance with Section 9(f),

(g) and (h) of the amended Act. But, appellants admit that the employer in question, Mr. Simon, had *not* exhausted his administrative remedy as he never filed unfair labor practice charges with the Board. He failed to obtain relief in the State court (*In re DeSilva, supra*), for this very reason. Appellants are attempting through declaratory relief to accomplish the same end sought in the *DeSilva* case and must necessarily fail in this proceeding for the same reason.

Although appellants' complaint distinctly alleges and demands relief from unfair labor practices as defined by the Act, appellants next, with remarkable facility, state in their brief that no such practices have in fact been committed. Appellees submit again to this court that upon appellants' own contradictory positions taken, in a stubborn attempt to avoid the remedies given them by law, there is no cause for relief, for there is no justiciable controversy upon which a declaratory judgment can be rendered.

In fact, the contradictory positions taken show there is nothing upon which a complaint may properly be made before any forum whether judicial or administrative, and this action may truthfully be said to be a sham, requesting only an advisory opinion upon hypothetical facts.

As an additional argument to support their contention of lack of remedy, appellants cite the National Labor Relations Board holding in the *A-1 Photo* case to the effect that the Board does not find small retail establishments to "affect commerce," since they are of remote and insubstantial effect. Appellants by their admission are "small businessmen." But, the fact that they are engaged in businesses which do not "affect commerce" most cer-

tainly does not entitle them to bring unfair labor practice charges before the Federal courts. Appellants' proposal here appears to be to the effect that while the Board has jurisdiction of all unfair labor practice charges involving employers who are engaged in commerce the Federal courts have jurisdiction of similar charges involving employers who are not engaged in commerce.

Quite obviously this proposal (while somewhat imaginative), is utterly unsound and without any foundation whatsoever either legal or equitable. The fact is that inasmuch as appellants are not engaged in and do not "affect" interstate commerce, no legal wrong is being done them nor can be done them in the conceivable future.

An activity of a labor organization which falls within the definitions of Section 8(b) of the Act is an unfair labor practice if, and only if, such activity has:

" . . . the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce." (Labor Management Relations Act, 1947, Title I, Section 1.)

As the activities of appellees in connection with appellants' businesses concededly do not "affect commerce" then none of these activities, regardless of their character, can by any possibility be declared to be an "unfair labor practice" (as demanded herein) under Section 8(b) of the Act. Appellants complain that they have no remedy, but what is there to remedy when there can have been no wrong? Appellants have literally stated themselves out of court by alleging violations of a law which does not, by their own admission, apply to them, and is in fact therefore non-existent as to them.

Appellants have also appealed to the equitable powers of the court to support their case. They argue that, (a) the Act was intended to cover the instant situation, and (b) that the Board affords no remedy, and then conclude that under its general equity jurisdiction the District Court should have retained the matter.

If unfair labor practices *affecting commerce* have actually been committed the National Labor Relations Board affords appellants a complete and the *exclusive* forum for their redress. Appellants need not appeal to the equitable jurisdiction of the court and in fact the court does not have such jurisdiction.

Where there exists an adequate remedy at law, equity will not hear the case. This principle, too elementary to need amplification, is the answer to the appellants' contentions.

Before the court may exercise its equitable powers, it must have jurisdiction over the parties and the cause of action. Appellants argue as noted above, that jurisdiction should be granted because the Board affords them no remedy. This alleged lack of remedy is based upon three separate contentions, (a) that no unfair practices have at this time been committed, (b) that appellants are "small businessmen" and without the scope of the Act and (c) that the Act does not cover the instant situation.

If no unfair practices have been committed, or if appellant employers are not engaged in commerce, then aside from all other consideration, there is no equitable cause for in the one case there is no wrong to redress and in the other the law relied upon does not apply to these parties and they cannot invoke it. Appellants cannot seri-

ously suggest to the court that its *equitable* powers can *extend* the Taft-Hartley Act to businesses *not* engaged in commerce despite the fact that the law was intended for and expressly limited to practices affecting commerce, yet that is precisely what they appear to argue. Does a Federal court "sitting in" equity have the power to change any given law of the land? Seemingly, appellants would say yes.

Further, to show the desperateness of their "snatching at straws," the appellants in their complaint take one position, that they are engaged in interstate commerce, in order to invoke the jurisdiction of the Federal courts, and in their brief take a completely contrary position, saying they are not in commerce.

The final contention of appellants is that the acts of the unions would compel appellants to coerce employees in violation of Section 8(a)(1) and that as this is not declared an unfair labor practice thus giving appellants a Board remedy, the equitable jurisdiction of this court will apply. The short answer to this is that appellants have made no attempt to obtain a determination of whether such acts actually are or are not unfair labor practices under the Act. Appellants say the Act does not make such acts unfair, but until a ruling of the Board is sought and obtained, appellants' statement is but a mere conclusion and entitled to no weight. We note that this assertion was supported by no authority and was preceded by an admission that charges had never been filed.

Appellants' then, have shown no grounds for the exercise of equitable jurisdiction by the court, and have failed to use the legal remedy provided.

Appellants fail to state a case or controversy within the accepted scope of the Declaratory Judgments Act. They ask merely for an advisory opinion of the court, which, of course, is not within the judicial powers of any Federal court.

Throughout their brief, as we have pointed out, appellants have admitted themselves to be without the scope of the Labor Act. For this reason they have failed to state a case arising under a Federal statute and as there is no diversity of citizenship in this case, appellants fail to bring themselves within the jurisdictional requirements of the Federal courts. Furthermore, beyond mere allegation, there has been no showing of the requisite jurisdictional amount.

Finally, if this proceeding is based upon the provisions of the Labor Management Relations Act, jurisdiction over the case lies solely with the National Labor Relations Board.

The complaint and brief herein have repeatedly demonstrated that:

- (1) Appellants have no cause for relief for the reason that they have no actual case or controversy which can be adjudicated.
- (2) Appellants, though asking for relief from "unfair labor practices" have admitted that no such practices have been or are presently being committed.
- (3) Appellants are not within the scope of the Commerce Clause and therefore are not entitled to the relief for which they pray because the activities of the appellees are not regulated by the Federal Labor Management Relations Act and are not in violation of the Act.

- (4) Even assuming the provisions of the Act to be applicable, and the activities of the appellees to be prohibited practices, the Federal courts have no jurisdiction over this case, *exclusive* jurisdiction then being with the National Labor Relations Board.

It is respectfully submitted to this court by the appellees for the reasons set forth in this brief that the dismissal of this proceeding by the District Court below for lack of jurisdiction should be affirmed.

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No. 12273

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA RETAIL DRUGGISTS ASSOCIATION, LTD., a non-profit corporation, etc., *et al.*,
Appellants,

vs.

RETAIL CLERKS UNION, LOCAL No. 770, an unincorporated association, etc., *et al.*,
Appellees.

APPELLANTS' REPLY BRIEF ON APPEAL.

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SEP 3 1940

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Appellees.

APPELLANTS' REPLY BRIEF ON APPEAL.

Recapitulation of the Facts.

Were it not for the misguided attempt of the appellees to mislead the Court brought about by a failure to comprehend the facts and issues in this action, appellants would not indulge the Court's time in this restatement of the facts and issues. Out of respect to the knowledge and capability they presuppose in the counsel for the appellees, such misinterpretation could more probably be an assumption of deliberateness as opposed to the conclusion that they have failed to understand the issues of this case.

Again and again counsel for the appellees refer to this action as one based upon a complaint for relief against unfair labor practices. The opening reference is made in appellees' brief at pages two (2) and three (3). and this

fallacious thought runs throughout the brief and is made in too many instances for appellants to name each instance. Appellees refer to Paragraphs XVIII, XIX, and XXIII of the complaint on file in the action as definitely alleging the commission of unfair labor practices. The Court's attention is called to the wording of these paragraphs where it is shown that appellants have merely set out what appellees threaten to do, have repeatedly stated that they will do and have a right to do, and what the results of such a course of conduct would be. Appellants have alleged no unfair labor practices within the scope of the amended National Labor Relations Act, nor is this complaint based on any such allegations even by innuendo.

To the contrary, appellants have shown that a controversy exists within the ambit of the Federal Declaratory Relief Act, that the facts constituting such controversy are not within the power of the National Labor Relations Board to hear on the basis of repeated Board decisions, and that such a controversy existing, appellants have shown jurisdiction within the Federal Courts to set the controversy at rest before it reaches the stage of arbitrary illegal action by either party, and have asked for a declaration of rights by this Court. That is all that is embodied in the complaint, that is all that is argued in Appellants' Opening Brief, and that is all that will be argued in this brief other than a short rebuttal to the fallacious arguments of opposing counsel and a showing of the attempt of appellees to lead this Court from the real and vital issues before the Court.

ARGUMENT.

I.

The Complaint in This Action Is Not Founded on the Claim of Unfair Labor Practices and Such Issues Are Not Before the Court.

Counsel for the appellees have attempted, by sarcasm on the one hand, and a slighting of the real issues on the other, to lead the Court astray and to "brush aside" the real issues in the action. Appellees have repeatedly stated that appellants have confused the issues, and that while the complaint is actually based on charges of unfair labor practices, the argument is made on other grounds. Any competent reading of the complaint and of Appellants' Opening Brief shows the contrary. A brief recapitulation of the facts here will show the fallacy in appellees' argument.

Contracts have been repeatedly presented to the appellant Drug Store owners with the statements that unless such store owners sign such contracts calling for use of appellee unions' members in such stores, economical and physical force will be applied to force such signing. Appellees have not been certified by the National Labor Relations Board as qualified representatives of such employees, nor can they be so certified, having failed to file the necessary affidavits with the Board. As the Court can readily see, the signing of such contracts would have the effect of forcing the employees in such drug stores into the appellee unions against their wills, AND WOULD HAVE THE EFFECT OF UNITING DIFFERENT UNITS OF LABOR IN ONE LABOR ORGANIZATION, TO WIT: PROFESSIONAL AND NON-PROFESSIONAL EMPLOYEES. These employees have expressed their unwillingness to being forced into

any such union, or any union, against their will, as witness their joining in this action.

Obviously the presentation of the contract involved here in and of itself is not an unfair labor practice of which the Board would take cognizance, nor would the threat of economic action itself constitute an unfair labor practice of which it can be said that the Board would take cognizance. If the Board would take cognizance of any overt act to punish a union for indulging in an unfair labor practice, there is nothing in the situation which makes it an unfair labor practice, due regard being given to the obvious; namely, that the Board will not concern itself with the unfair labor practices indulged in against a small business man. (The Board will not concern itself with the small business man because his problem in and of itself will not affect the national scene. This is contrary to the opinion of the Board's counsel that if commerce is present, there is no discretion. In other words, these acts of presenting the contract and the making of threats instead of showing jurisdiction before the Board do nothing more than show the necessity for Declaratory Relief. (Borchard, p. 57.)) Furthermore, the controversy for which declaratory relief is sought covering the situation with reference to the employee plaintiffs is actually outside that portion of the Act which covers the jurisdiction of the Board. In other words, when does an unfair labor practice as defined in the Act become an unfair labor practice, or contrariwise, when does an unfair labor practice cease to become an unfair labor practice?

The complaint, then, sums up to this: It is a request for a declaration of rights by store owners and employees, as to whether or not the appellee unions have any right

under the National Labor Relations Act to force the employer, or any group of employers, to in turn force his employees into any union against their will. It is readily seen that no charge of unfair labor practices is presented, that no such charge is argued, and that appellees' argument is a deliberate fallacy designed to mislead this Honorable Court, and an attempt to force a petition to the National Labor Relations Board which would be denied, no jurisdiction residing in that panel at the present time.

Appellants do not deny that many decisions have held that exclusive jurisdiction to hear charges of unfair labor practices resides in the Labor Board where such unfair labor practices exist. Appellees rely greatly on the case of *Amazon Cotton Mill Company v. Textile Workers of America*, C. C. A. 4th, 1948, 167 F. 2d 183, to sustain their position. Appellants have no argument with the decision in that action, but call this pertinent fact to the Court's attention: In the *Amazon* case, the charge was based on AN ACTUAL UNFAIR LABOR PRACTICE, TO-WIT: THE REFUSAL OF THE EMPLOYER TO BARGAIN WITH THE DULY QUALIFIED REPRESENTATIVE OF HIS EMPLOYEES. (Amended National Labor Relations Act, Sec. 8(a)(5).) In the above cited case we have a much different situation from the one in this action, a case there being presented where jurisdiction actually resided in the Board. In that case the charge fell within an enumerated unfair labor practice of the Act. And as pointed out by appellants in their opening brief (p. 8), the forcing of the employees into a union not of their own choosing constitutes an unfair labor practice BY THE EMPLOYER, but the coercion is indirectly applied by the union. Does the Act constitute this an unfair labor practice by the union, and thus can any charge at all be filed by the employer and employee

against the coercing union? The appellants contend "No"—do the appellees by their argument here contend "Yes"? Then a declaratory judgment is necessary, particularly when we consider the likelihood of the Board's holding that it has discretion to refuse to act, regardless of commerce or jurisdiction. The result is that the acts of the appellees in this instance do not come within the enumerated acts constituting unfair labor practices by a labor union set out in the amended Labor Relations Act, Section 8(b), and as of this date no overt act has been committed, the appellees confining themselves to threats. However, the contracts have in fact been presented, and the threats complained of have been in fact made. The controversy still exists, and will continue to exist until put at rest by this forum, which is the only competent forum to determine the controversy until damages have accrued, at which time a suit for coercive relief may be filed. Appellees say in effect that though they have presented the contracts, and have made the threats, and have in the past continued such threats until actual unfair labor practices exist, they do not intend to do so in this instance, and that appellants bring this action on hypothetical facts. Appellants repeat, the contracts have not been called for as a withdrawal, the threats have not been withdrawn, but to the contrary, other contracts have been presented to other stores and store owners and new threats of economic and physical coercion have been made. Appellants cannot ascribe to the "holier than thou" attitude now assumed by these appellees in view of their actions and the controversy continues to exist, the contracts having once been presented. Rather than being evidences of unfair labor practices, the continuing course of conduct more persuasively shows the continuance of the controversy and the necessity for declaratory relief.

II.

**Appellants Do NOT Misquote or Misstate the Cases
Referred to by Appellees in Appellees' Brief.**

To further mislead the Court, appellees have resorted to accusations to the effect that counsel for the appellants misstate and misquote certain cited cases. In view of the holding of these cases, the Court will certainly not be led astray. Appellees refer in particular to the cases of *Rice & Holman v. United Electrical Workers*, 16 C. C. H. Labor Cases, Par. 65087, and to *Int'l. Union U. A. W.-A. F. L., Local 232, v. Werb*, C. C. H. 16 Labor Cases, 64,992. In the *Rice & Holman* case, appellees attempt to distinguish it on its facts, when in fact the case holds as stated by the appellants. Appellants herewith set forth language from this decision:

“The present suit is for protection of plaintiff’s property and personal rights in nowise dependent upon the labor contract between the parties, and it invokes the court’s *inherent jurisdiction*.—There is also no force to defendants’ contention that the complaint lacks equity because adequate relief may be had at law, or before or through the National Labor Relations Board. Damages at law are not equivalent to equitable personal relief. Plaintiffs cannot obtain such equitable relief from said Board in any event, nor even from the federal courts except at the suit of the Board.” (Emphasis ours.)

Rice & Holman v. United Electrical Workers, 16
C. C. H. Labor Cases, Par. 65,087.

Now as before stated by appellants, this case was not originally cited to show that jurisdiction was in another than the Board where unfair labor practices are charged. It was and is cited to show that in fact there is no relief available to appellants before the Board, no unfair labor

practices having been committed. But appellants are of the opinion that this case should also be cited to the effect *that even though unfair labor practices are being committed, there may be a remedy other than before the Board in which appellees allege exclusive jurisdiction.* The language of the decision allows of no other construction, and the case has not been reversed. The Wisconsin case cited above is only a reiteration that no adequate relief, in fact *no* relief, exists before the Board and that therefore the administrative remedy available to the appellants has in fact been exhausted, that in fact no such administrative remedy ever existed.

In the face of the National Labor Relations Act, Section 303(a)(b), appellees cannot seriously contend that the individual employee does not have an action for damages against any employer who forces such an employee to either quit his employment or to join some labor organization against his will by the signing of a labor contract for employment of only union members when such union has not been certified as representative of such an employee, and could not be so certified. The right of the employee to work is a vested property interest and one which he has an inherent as well as a congressionally given right to protect. In light of this certain liability to be incurred by appellant store owners if such labor contract is signed, appellees cannot contend with serious thought that a controversy does not exist in this instance, and one which the National Labor Relations Board has no power to hear or determine. Such determination can be given only by the Federal District Courts, as it is the property right of the employee which is sought to be protected and the Board has no jurisdiction over this right of the employee. Appellants seek merely to avoid liability to their employees and prosecution by the Board alike.

III.

The Complaint and Brief of Appellants Are Not at Variance.

Having shown that there is no charge of unfair labor practices, but merely the charge that appellees try to force appellants into the commission of unfair labor practices, appellants need spend little time on this alleged confusion of the appellees. Any confusion of appellees is by deliberation and not as a result of the pleadings and brief of appellants. The citing of the "small business" cases by appellants only show that refusal of the Court to take jurisdiction here will result in a futile act, and one which will avail neither the Court, the Board, nor the parties of any benefit. The parties plaintiff in this action are much analogous to the parties in the cases cited in Appellants' Opening Brief at pages eight (8) and nine (9) and appellants are but led to believe that the decision of the Board would be the same as in those cases, *if in fact it were found by this Court that unfair labor practices had already been committed in this instance.* In addition to the cases cited in Appellants' Opening Brief, appellants add the case of *Haleston Drug Stores, Inc.*, 82 N. L. R. B. 148. As in the prior "small business" cases the Board denied relief to the petitioning employer, said request for relief being based on charges of unfair labor practices, finding that while the employer may be engaged in commerce, it did not care to exercise its discretion to bother with the case due to its small effect on commerce. Thus we find that while such employers are engaged in commerce, and are subject to the terms of the National Labor Relations Act, the Board has continuously refused to take jurisdiction, throwing the petitioning employer right back on the courts for his relief. Appellants seek, then, to point out to the Court that it would be but a futile and impotent act to

send appellants before the Board, on this ground alone, as it must in the final analysis hear the action. Thus, even if it could be said that unfair labor practices exist in this controversy within the scope of the Act and previous Board decisions, it has never been the policy of the Court to demand a futile and useless act of any petitioner, and the futility of appeal to the Board is apparent in this case upon the basis of their alleged discretion to take or not to take jurisdiction.

BOARD DECISIONS EXERCISING DISCRETION IN THE BOARD OVERRULES THE INTENTION OF CONGRESS OR REDUCES THE BOARD'S JURISDICTION FURTHER NECESSITATING THE GRANTING OF DECLARATORY RELIEF.

It is a strange travesty upon federal justice when a Board can so circumscribe its own duty to enforce a federal statute which seeks to preempt the field of labor management relations before the law so that a small business man's problems must go begging without a judicial forum for a remedy which the law purports to grant him. The effect of his labor relations here is more direct than is true with much larger businesses. Many of the important drugs—miracle drugs—are shipped direct to him from outside the state by common carriers which cannot even come to rest on appellants' shelves if a picket line surrounds his store. A substantial amount of such items come direct.

The absurdity of the Board's position has no precedent or parallel. There was a practice of hand-picking cases by the Board several years ago because Congress cut down on its appropriations. How unfortunate a tragedy there would be if Senior Judge Paul McCormick of the District Court of the Southern District had given up his fight for more District Court judges. The analogy is the same. Hence it is with poor grace for appellees to so argue that it is an unfair labor practice and then further contend that

appellants are outside the pale and hence not even entitled to a declaration of their rights and obligations under the statute. How easy to eliminate the expenses of the Board if it were judicially determined that:

(1) It is unlawful for the Union to coerce an employer to in turn coerce a professional employee into a union not of his own choosing.

(2) It is unlawful for the Union to demand a union shop agreement without an election or certification.

(3) It is necessary for the Board to carry through its jurisdiction if acts actually constitute a commission of an unfair labor practice.

IV.

The Federal Declaratory Judgments Act Is Applicable to the Situation and Controversy in Issue.

Appellees have spent some portion of their brief in contention that appellants present this case on hypothetical and contingent facts; that is, facts which may come into existence in the future, but which do not exist at the present. Appellants wonder if appellees consider the presentation of the contracts in question and the demands made by the presentors of such contracts are to be considered as acts which may happen in the future. Appellants are more prone to consider these acts as present and existing facts. Appellants also wonder if appellees consider the difference in construction of the National Labor Relations Act which has been taken by the parties to this action is a difference which is only contingent rather than present and existing. Obviously, this portion of the appellees' brief is the *grasping at straws* of which they accuse appellants. To clarify appellants' position, appellants would like to cite from the

same authority used by appellees, to-wit: Borchard, Declaratory Judgments, page 56. Now appellants do not deny that a contingent and hypothetical fact situation is not a proper fact situation for declaratory relief. Appellees have set forth nothing to show that this is in fact such a hypothetical situation, but to the contrary have taken the position that it is such a situation, and cited cases to show that if the fact situation is as they have assumed it to be, jurisdiction should not be taken. Appellants submit that these facts do not show such a hypothetical situation, but to the contrary show a justiciable controversy within the definition given by Mr. Borchard, who could perhaps be called the father of the Declaratory Judgments Act, to-wit:

“When are the facts contingent? That is not always easy to determine. The Pennsylvania Supreme Court in an exhaustive opinion which has been followed extensively, laid down the rule that the Court must be *satisfied that an actual controversy, or the ripening seeds of one, exists between parties, all of whom are sui juris and before the court, and that the declaration sought will be a practical help in ending the controversy.* By ‘ripening seeds’ the court meant, not that sufficient accrued facts may be dispensed with, but that a dispute may be tried at its inception before it has accumulated the asperity, distemper, animosity, passion, and violence of the full-blown battle which looms ahead. *It describes a state of facts indicating ‘imminent’ and ‘inevitable’ litigation, provided the issue is not settled and stabilized by a tranquilizing declaration.*” (Emphasis ours.)

Borchard, Declaratory Judgments, page 57.

It is but interesting to note that the appellees have apparently not indulged themselves in reading any of the ad-

mirable work of Mr. Borchard other than that portion which will support the assumption they would like to impose upon this Honorable Court. The Pennsylvania decision cited by Mr. Borchard is the case of "*Kariher's Petition*," 284 Pa. 455, 471; 131 Atl. 265, 271 (1925), and while not binding upon this Court, has been widely followed as indicated by Mr. Borchard.

Appellants respectfully submit that having shown no unfair labor practices to exist in this instance, and thus showing no jurisdiction in the Board, the jurisdiction of the Court is not being extended when this Court takes jurisdiction under the Declaratory Judgments Act and declares the rights of the parties to this action upon the controversy presented, and appellants call the Court's attention again to the cases cited by them on pages 16, 17, 18, 19, 20, 21, 22, and 23 of Appellants' Opening Brief.

The Court's attention is also again called to page 20 of Appellants' Opening Brief where appellants have shown that if appellees are successful in forcing appellants into violation of the Labor Act, the appellant store owners then become liable for damages to the respective employees who are injured by force of such violation, AND THAT THE PROPER COURT FOR THE TRIAL OF SUCH LIABILITY IS THE FEDERAL DISTRICT COURT. (National Labor Relations Act, Sec. 303, (a) and (b).) Appellants respectfully submit that the force of this provision is great and that due consideration should be given to it. If the appellants are liable before this Court for violation of the Act, WHAT OTHER FORUM MAY DECIDE THE APPELLANTS' RIGHTS UNDER THE ACT? It is respectfully submitted that no other forum could so decide and that appellants are for this reason, if for no other, properly before the Federal Courts. The Board has nothing to do with this phase of the Act, if jurisdiction is otherwise in Federal District Court.

V.

The Elements of Federal Jurisdiction Have Been Met
by Appellants.

Appellees cite several cases under Paragraph VIII of their brief (pp. 19-20) in an effort to show that the jurisdictional requirements of the Federal Courts have not been met. With the exception of the case of *Thomson v. Gaskill*, the validity of the cases are dependent on the assumption which the appellees have indulged in all through their brief, to-wit: that this action only concerns hypothetical facts and figures. Thus appellants will concern themselves only with this one case.

Appellees have indulged themselves in this statement at page 19 of their brief: "The amount in controversy must be measured by the pecuniary consequence to either party to an action. (*Thomson v. Gaskill*, 62 Sup. Ct. 673.)" Now it is apparent to appellants, and we believe to this Court, that appellees have either neglected to read the entire case cited above, or have deliberately misconstrued the decision. Citing from that decision, we find that the opinion by Justice Frankfurter actually holds this:

"Upon the defendants' motion to dismiss the cause for want of jurisdiction, the District Court held that the pleadings and supporting affidavits established that the amount in controversy as to any one plaintiff does not amount to as much as \$3,000.00, and that the nature of the suit was not such as to permit aggregation of the claims of all the plaintiffs. . . . The Circuit Court of Appeals reversed the dismissal. . . . Since the record does not contain the various

agreements upon which the plaintiffs' action is founded, there is no basis for determining whether this is a suit 'in which several plaintiffs, *having a common undivided interest*, unite to enforce a single title or right, *and in which it is enough that their interests collectively equal the jurisdictional amount.*' " (Emphasis added.)

Thomson v. Gaskill, 315 U. S. 442, 62 Sup. Ct. 673.

Now it is apparent that the above decision concerns a case where several plaintiffs have joined whose interests are not common and united, but for purpose of settling litigation in one suit, an absolutely contrary situation than that which appears here. Justice Frankfurter has in fact held that in a situation like that of appellants, the entire amount in controversy, constituting an aggregation of any and all individual amounts and injuries claimed, is the jurisdictional amount with which the Court is concerned. Appellants' citation at page 27 of their Opening Brief is but sustaining authority for this position and for appellants' position here.

Appellees' further argument that there is no equity jurisdiction in the situation herein presented is but facetious and without force and is based entirely on the fact that they *assume* an adequate remedy at law to exist for appellants. Appellants have clearly shown that not only is there lacking an adequate remedy at law, *there is in fact no remedy at law.*

Conclusion.

Appellees have based their entire argument on the deliberate fallacy that appellants bring their action based upon unfair labor practices, and further assume that their assumption is correct and that appellants have a remedy before the National Labor Relations Board. Appellees rely heavily upon the *Amazon Cotton Mills* case, the *Gerry* case, and the *DeSilva* case, all of which appellants have shown are not in point for the purposes for which they have been cited. Appellants have clearly shown that there is no adequate remedy at law, that there is in fact no remedy before the Board, that the sending of the appellants before the Board by this Court on any construction of the facts would be but to do a futile and impotent act and that appellants would be thrown right back before this honorable forum, that the complaint is clearly within the ambit of the Federal Declaratory Judgments Act and within the jurisdiction of the Federal Courts. All jurisdictional requirements have been met. On the basis of the National Labor Relations Act as it now exists the only relief for these appellants is before the Federal Courts. Any denial of such relief would be to say to these appellants that this Court recognizes that there may exist many wrongs for which the Courts offer no remedy, a statement which this Court cannot be prepared to make.

Appellants respectfully submit that jurisdiction in this forum has been decisively shown. Hence this Court can without further ado set the issues herein at rest by ruling as follows:

(1) That pharmacists in all of the drug stores who are represented in this action are professional employees within the meaning of Section 2(12) of the Labor Management Relations Act of 1947;

(2) That student pharmacists in all of the drug stores represented in this action are professional employees within the meaning of Section 2(12) of the Labor Management Relations Act of 1947;

(3) That such professional employees are protected in their right to choose any representative they may select to represent them in collective bargaining, and that coercion of the employer by the union to in turn coerce the employee in question into any labor organization is an unfair labor practice by the coercing labor union;

(4) That any labor agreement entered into by an employer with a labor organization which has not been and cannot be certified by the National Labor Relations Board as the legitimate bargaining agent of the employees concerned is necessarily invalid and void in its entirety, and that any validity given by employers to such a contract may render the appellant employers liable in damages to appellant employees and others similarly situated.

J. WESLEY CUPP,

Attorney for Appellants.



No. 12273

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA RETAIL DRUGGISTS ASSOCIATION,
LTD., a non-profit corporation, etc., *et al.*,

Appellants,

vs.

RETAIL CLERKS UNION, LOCAL No. 770, an unincorporated association, etc., *et al.*,

Respondents.

APPELLANTS' REPLY TO AMICUS CURIAE BRIEF.

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Respondents.

**APPELLANTS' REPLY TO AMICUS CURIAE
BRIEF.**

This Is an Action for Declaratory Relief.

I.

**A Restatement of the Issues and the Scope of the
Action.**

Since this action was filed, and even since the filing of appellants' opening brief on appeal, it seems that appellees on the one hand, and now the National Labor Relations Board on the other, have led everyone concerned with this action far afield as to the precise issues involved. Appellants believe, that in the interest of justice, it would be well to once again examine the pleadings in this action, and to once again determine what remedy it is that is being sought, and why such a remedy is being sought.

What factual situation the brief filed by the National Labor Relations Board as *amicus curiae* is meant to cover is not clear to appellants, as the facts are not completely or clearly set forth in the brief. The brief may well be written to cover another factual situation, to cover facts which are not available to appellants, nor is the record on appeal available to appellants because of shortness of time. Hence the Court can readily perceive that appellants are put in the position of having to answer a problem which may or may not exist in this action, and to answer on the basis of facts with which appellants are not familiar.

However, appellants are familiar with the facts of this case and would like to briefly set them before the Court again. Briefly, they are these: Appellee unions present labor agreements containing certain provisions which appellants consider to be illegal, and appellees inform appellants that they (appellants) must sign such contracts or suffer the economic coercion which appellees will bring to bear. (It will be remembered that the appellees are not certified by the National Labor Relations Board, nor can they be due to their failure to file the requisite affidavits before the Board.) One of the provisions of such labor agreement is that "professional employees shall be included in the same bargaining unit as non-professional employees." This is, of course, contrary to Section 9(b)(1) of the Amended National Labor Relations Act, hereinafter referred to as the "Taft-Hartley Act." If the employer signs such an agreement, forcing the professional employee into a non-professional unit without his consent, the employer becomes guilty of an unfair labor practice if the employer's construction of the Taft-Hartley Act is correct. Thus, the employer has stated that he will not sign the agreement, and by becoming parties

to this suit numerous employees have indicated that if such an agreement is signed, thereby violating their property rights in their positions as professional pharmacists, they will bring actions for damages against the violating employers. And so the controversy blazes at full fury.

Appellants have alleged the presentation of the contract and the accompanying threats. In addition, they have tried to set before the Court the situation that will exist if the threats are carried into practice, and upon the basis of the past acts, methods, and practices of appellees, little doubt can exist that appellees intend to carry out the threats made. The crux of the controversy may be stated thusly: The appellee unions contend that for the purpose of collective bargaining, pharmacists and student-pharmacists are not entitled to vote separately for non-inclusion in an over-all union, as they are not professional employees within the scope of the Taft-Hartley Act. Appellants contend that such employees are professional employees and are entitled to vote separately and apart for inclusion or exclusion in any non-professional unit as they see fit, or to vote for inclusion in no labor unit whatsoever.

Now from the above controversy, these issues have arisen, to wit:

1. Is the employer guilty of an unfair labor practice if he is forced to succumb to the economic coercion of a labor union and to sign such an agreement as has been hereinbefore mentioned?

2. May the employees who are injured in their property by the signing of such an agreement by the employer have an action against such an employer for damages?

3. Is such an agreement, when signed in direct contravention to a provision of a Federal Statute, a valid and binding agreement?

4. IS THERE A FORUM IN WHICH THE RIGHTS OF THE PARTIES TO SUCH AN AGREEMENT MAY HAVE THEIR RIGHTS DECLARED PRIOR TO THE ACCRUAL OF COERCIVE RIGHTS AND OF IRREPARABLE DAMAGES TO THE PARTIES?

It is respectfully submitted that if the answer to the first three questions posed is "yes," then the answer to the fourth is equally "yes" and that such a forum is the United States District Court.

II.

Are the Parties Plaintiff to This Action Entitled to Be Heard in a District Court of the United States?

The one issue before this Court is the question of jurisdiction of the District Court of the United States to hear an action for a declaration of rights arising under a Federal Statute. Only by consideration of the questions posed above can that issue be justly solved.

As far as appellants have been able to determine, the sole objection to the District Court's jurisdiction is that the Federal Government has pre-empted the field, and conveyed, by Act of Congress, all jurisdiction over labor matters to the National Labor Relations Board. It is said that this is done by virtue of the provisions of the Taft-Hartley Act.

Stated succinctly, they contend that declaratory relief should be denied because there is a possibility that each plaintiff or another similarly situated could resort to the Board and the Board may take jurisdiction.

It is admitted by the National Labor Relations Board (their brief p. 11) that Section 10 of the Taft-Hartley Act is the sole provision that grants the alleged exclusive jurisdiction to the National Labor Relations Board to hear and decide all matters pertaining to labor and affecting commerce. That section is entitled "PREVENTION OF UNFAIR LABOR PRACTICES," and as far as is pertinent is herewith set out:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise."

Amended National Labor Relations Act, Sec.
10(a).

The Act then goes on to set out what the procedure of the Board shall be and how the Board shall operate. Appellants, then, would like to pose this question: Is there anything in this provision of the Act, from which the Board admittedly draws its jurisdiction, which prohibits the Courts of the United States from taking jurisdiction of any matter OTHER THAN A COMPLAINT CHARGING UNFAIR LABOR PRACTICES? Further, is there anything in this provision which interferes with the inherent Equity jurisdiction of the District Courts of the United States? Appellants respectfully submit there is nothing to prohibit such jurisdiction and herewith set out their reasons.

As was indicated in the main topics of this brief, this is an action for Declaratory Relief, asking for a declaration of rights, both of employers and employees, an attempt to determine their position prior to the accrual of

damages to either party. Appellees have not bothered to deny that a controversy exists, other than to allege that this is a hypothetical situation. Now inasmuch as this appeal arises upon the sustaining of a motion to dismiss, the federal equivalent of the demurrer, appellees have admitted every well pleaded fact to be true and cannot seriously deny that a controversy exists. The controversy existing, then, does this Court have the power to hear it? Even the appellees have indicated yes, unless the Federal Congress has pre-empted the field to the National Labor Relations Board. We come, then, to the discussion of whether or not the labor field has been so pre-empted.

The source of the National Labor Relation Board's jurisdiction has been set out above in the provisions of Section 10(a) of the Taft-Hartley Act. If the Congress meant to vest the National Labor Relations Board with the complete power over the entire labor field, would it have stricken the words "shall be exclusive" from the text of the original Labor Act, to-wit, the Wagner Act? The answer is apparent, and of course, such was not the intent. The Board attempts to answer this question by the citation of *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F. 2d 183, and a quotation from the opinion in that case. The Board is apparently overlooking the obvious; that is, in the *Amazon* case, the complaint charged that unfair labor practices were being committed, AND AN INJUNCTION WAS REQUESTED. In its opinion, the Court held nothing other than that "there was no intention on the part of the Federal Congress in the Amended National Labor Relations Act to change the Board's jurisdiction OVER UNFAIR LABOR PRACTICES" The Board calls this a *broad holding* (Board's Brief p. 19). To the contrary, it is a narrow

holding, merely reiterating the power of the Board to deal with cases charging unfair labor practices and seeking an injunction. The line of authority cited by the Board in support of the *Amazon* case are cases arising upon the same factual situations and applying the same reasoning. It is easily shown that fine judicial minds are unsettled upon even this situation, as witness the holding in the case of *Dixie Motor Coach Corp. v. Amalgamated Ass'n etc., et al.*, 14 Labor Cases, 72, 480. In the *Dixie* case, the Dixie Motor Coach Corporation had a working arrangement with the Southern Bus Lines. Southern Bus Lines became involved in a labor dispute with the union with which it had had a contract. The union threatened to picket Dixie if it continued its arrangement with Southern, and Dixie's employees stated they would not cross such a picket line if it were established. Dixie brought suit for an injunction prohibiting such secondary picketing in the District Court of the United States, Western District of Arkansas. The union defended on the grounds that the Court was without jurisdiction to issue the injunction. Appellants cite from the opinion of the Court:

“ . . . It is true that the Taft-Hartley Act does not expressly authorize a United States District Court to issue an injunction prohibiting the commission of such an act; *on the other hand, it provides that the injured party may sue for damages resulting from the unlawful act*; BUT THE Taft-Hartley Act does not forbid the issuance of an injunction under these conditions; and here we have a situation where an unlawful act is about to be committed *which will either require Dixie to become a party to the commission of such unlawful act, or close its terminal and suffer irreparable damage for which the remedy provided by the Act is inadequate, and with resulting damage to the traveling public.*” (Emphasis ours.)

As conclusions of law, the Court found:

“The court has jurisdiction of the parties and of this action . . . The court has inherent power to grant a permanent injunction in this cause.”

Here the District Court found that it had jurisdiction to hear a cause which requested an *injunction* as the proper relief, and the injunction was granted. Now it is true that this decision was reversed (170 F. 2d 902), but when it is observed in the light of several other decisions, it becomes apparent that some of the finest judicial minds in this country are of the opinion that Congress not only did not intend to divest the Federal Courts of *all* jurisdiction over labor disputes, but did not even intend to divest the courts of jurisdiction in all cases of unfair labor practices.

For sustaining authority of the above proposition, the Court is referred to first, the 1941 decision in *Klein v. Herrick*, 41 Fed. Supp. 417, and *Fitzgerald v. Douds*, 167 F. 2d 714. The *Klein* case was under the old Wagner Act, and at a time when the term “shall be exclusive” was still a provision of the Labor Act. In that case the union petitioned the Federal District Court for an injunction to prevent the Board from Conducting an investigation for decertification. The Board defended on the ground that the Court did not have jurisdiction. Following is language from the opinion of Judge Rifkind in the *Klein* case (41 Fed. Supp. 417):

“Continuing on the assumption that plaintiff is being injured by the action of defendant and is threatened with further injury, it seems clear that the National Labor Relations Board has not provided an internal method of review which would now or here-

after fully afford plaintiff redress of the wrong committed. I do not find in Section 10 (Wagner Act) an express denial of jurisdiction to the District Court over a controversy of the character herein described; nor is there any inconsistency between the scheme for review of certain types of action delineated in the Act and the *preservation of the court's general equity jurisdiction* over controversies not reached by the Acts provisions." (Emphasis ours.)

An injunction was denied in the *Klein* case, *not due to a lack of jurisdiction in the Court*, but due to a failure of the petitioners to sustain the burden of proof of irreparable damages and continuing property damages.

It is interesting to note that the Board cites *Fitzgerald v. Douds* (167 F. 2d 714) for authority for their position; it is in fact the contrary, and a review of the decision will so prove. The *Fitzgerald* case arose upon a petition to the Federal District Court for an injunction to prevent the employer from holding a certification election. The employer had a contract with the petitioning union, but other unions had filed for representation. While the Board could not certify (or decertify as the case may be) a new union until the prior valid contract had expired, the petitioning union feared, and alleged, irreparable damage to their position and to their property interest in the contract. The injunction was denied, but the reasoning of the Court upheld the Court's jurisdiction under proper facts, as witness this language from the opinion of Justice Swan on appeal in the *Fitzgerald* case (167 F. 2d 714):

"They contend, however, that the National Labor Relations Act has not deprived the district courts of their general equity jurisdiction under section 24 of the Judicial Code, 28 U. S. C. A., Par. 41, and that

the Board may be enjoined from acting in a matter beyond its jurisdiction if a proper case for equitable relief is presented. They rely primarily upon *Klein v. Herrick*, D. C. S. D. N. Y., 41 F. Supp. 417, where Judge Rifkind held that the court had jurisdiction to enjoin the carrying out of an order directing an election, but dismissed the complaint on the ground that the suit was premature and the complaint failed to allege that irreparable damage had resulted or would result from the action sought to be enjoined. Judge Frank agrees with this view. If it be assumed that jurisdiction of the subject matter exists in the case at bar for the reasons stated by Judge Rifkind in *Klein v. Herrick*, *supra*, denial of a preliminary injunction and dismissal of the complaint were nevertheless correct . . . In the second place, the plaintiffs do not show that the holding of the hearing will cause irreparable injury." (Emphasis ours.)

Once again we find a Court, composed of judges of the eminence of Learned Hand, Thomas Swan, and Jerome Frank, sustaining the jurisdiction of the Federal Courts to hear a proper equitable case. The case is not decided on a refusal of jurisdiction, but upon the failure of plaintiffs to make a proper factual showing. It becomes more and more apparent, then, that the Federal Congress has not vested the National Labor Relations Board with exclusive jurisdiction in all Labor matters: further than that, obviously it has not vested the National Labor Relations Board with exclusive jurisdiction in every case even over unfair labor practices. If this be the case, then, and appellants can hardly comprehend a contrary finding, the following issue is pertinent at this point.

III.

Does the Board Have Exclusive Jurisdiction Over the Factual Situation Herein Presented?

In the above cases we found situations much more severe in their contradiction of the Board's position than the one appellants present in this instance. *They were suits for injunction and brought directly upon charges of unfair labor practices, or unlawful acts of the union, and they were in direct conflict with the Board's claim of exclusive jurisdiction.* Here we have a suit for a Declaratory Judgment, founded upon a controversy over the application of a Federal Statute, and the status of a particular group of people, *i. e.*, pharmacists and their status as professional or non-professional persons. If the construction of appellees is followed, the employers are forced to sign themselves into a position of liability, *for which the remedy is a suit by the employees in the United States District Court.* The employer is forced into a position from which he will suffer irreparable damages and loss of property, a loss which is continuing. It is respectfully submitted that an injunction would lie on these facts. However, is there less cause to grant relief due to the appellants' choice of the milder remedy rather than the more severe?

The Court is not without precedent in an action for Declaratory Relief upon facts arising under the National Labor Relations Act, as witness the decision by Judge McCormick in *Dist. Lodge 94 of the Int'l Ass'n of Machinists v. Akmadzich, etc.* (15 Labor Cases, 64, 564; 22 L. R. R. M. 2095). In that case *the unions* brought an action for Declaratory Relief to ascertain whether or not certain provisions of a collective bargaining contract were in contravention of the terms of the Taft-Hartley Act. Both

parties filed briefs and argued, and made motions for summary judgment. The unions argued for the validity of the contract. The motion of defendant employers was upheld and the contract declared invalid. Following this decision are the recent decisions by Judge Pierson Hall, of the District Court of the United States for the Southern District of California, that in proper cases Declaratory Relief will lie upon a controversy arising under Sections 301-303 of the Taft-Hartley Act (*Studio Carpenters Local Union No. 946, etc. v. Loew's, Inc., et al.*, 17 Labor Cases 76335; *Andrew Mackay v. Loew's, Inc.*, 17 Labor Cases 76336; both cases being found in Advance Labor Law Reports at pars. 65,356 and 65,357, respectively). Inasmuch as employee-pharmacists are parties to this action, and since both employees and employers are injured in their property, and hence under Section 303 of the Taft-Hartley Act have a right to sue, the above cited cases become of great weight, though District Court decisions and not binding on this Court.

Obviously, from the language of the Taft-Hartley Act, and the construction placed upon it by Judge Hall, Sections 301-303 do not confine persons entitled to sue thereunder to an action for damages. They may seek the less coercive relief of a Declaration of Rights, or, Declaratory Relief. This being clear, it remains only to establish the question of "diversity of citizenship" as to Section 303, that section being applicable to the wrongs threatened and the violations herein anticipated as a result of appellees' wrongful act. Appellants cannot accord with Judge Hall's requisite of diversity of citizenship in Section 303 of the Taft-Hartley Act, but if such diversity be a factor the requirement is present here as the local Retail Clerks Union is nothing

more than an agent of the International Union, is here merely attempting to effectuate the parent union's policies, and cannot act without the consent of the parent union. While appellants do not believe it would be necessary to make the International Union a party in name in order to obtain diversity, if such should be the opinion of this Court, appellants would respectfully ask leave to amend in that particular. However, it appears that every requisite of jurisdiction exists under Section 303 of the Taft-Hartley Act, as under the other qualities herein set out. To refuse jurisdiction on the grounds that the International was not a party would be to merely forestall the trial on the merits as that union could be brought in by the simple expedient of filing a new action with one party added as party defendant.

We find, then, that the complete field of labor has not been pre-empted to the jurisdiction of the Board, and that Declaratory Relief will lie where it is clear, as in the fact situation at hand, that there is no adequate relief before the Board.

Upon what premise, theory, or surmise does the Board presume to contend that the National Labor Relations Act conferred upon them the privileges of the Judiciary Act, thus granting them the power to grant Declaratory Relief? The Board seeks to intervene in this action, presenting a brief designed for another case, upon entirely different facts, and a case which is still pending as far as appellants are able to determine. Were the Court to sustain the Board's position, upon what authority could the Board grant the relief prayed for, to-wit, a declaration of rights? It is respectfully submitted there is no such authority. The intent of the Federal Congress was to vest the Board with

the power to seek injunctions in certain instances. As has been shown by appellants, the Board is not empowered to do even this in all instances. Only from Section 10(a) of the Taft-Hartley Act does the Board presume to get its jurisdiction, and that is a jurisdiction to hear and determine charges of unfair labor practices. To sustain the Board's position in this matter would be to say that by the Taft-Hartley Act, the Congress meant to vest the National Labor Relations Board with all the powers given to the Federal Courts by the Judiciary Act. This is an impossible position in which the Board has placed itself and cannot be sustained upon any construction of law or reason.

The primary difficulty with the position of the Board is that it assumes a factual situation similar to the ones in the cases cited by it. This is brought out in bold relief in the Board's brief (p. 21), in which it takes up the scope of the Declaratory Judgments Act and cites many cases for the proposition that the Act does not enlarge the jurisdiction of the Federal Courts. Appellants have in no way asserted that the jurisdiction of the Federal Courts is enlarged by the Declaratory Judgment Act. But every case upon which the Board predicates its position is a case arising upon a charge of unfair labor practices, requesting an injunction in addition to Declaratory Relief, or upon certification proceedings. While it is far from conclusive that the Federal Congress has in fact pre-empted the field on these issues to the National Labor Relations Board, there is more probability of such pre-emption than upon the facts presented here. None of the cases cited by the Board are upon such facts as arose in the *Akmdzich* case, *supra*, nor apparently is the case from

which the Board's brief is taken. Hence it is not an enlargement of the Federal Jurisdiction for an action such as this to be heard; it is merely an exercise of the discretionary jurisdiction vested in the Federal Courts. For further authority upon appellants' position, in addition to the above, and in further answer to the contentions of the Board raised upon this question, appellants respectfully request that the Court refer again to appellants' opening brief, pages 15-24, inclusive.

The question presented by the Board as to whether or not appellants have exhausted their administrative remedy has been discussed at length in appellant's opening brief, and in our reply brief to the brief of appellees. The question presents little merit, and appellants, out of respect for the time of the Court, respectfully request the Court to refer back to appellants' opening brief, pages 4-14, inclusive.

The only other direct question posed by the Board is whether or not the Court could render a decision binding upon the parties and upon the Board in this situation. The Board poses the presumption that it is vested with the power to overrule the duly constituted Courts of the United States, even where it is found that such courts have jurisdiction over the subject matter and the parties. Is this Court, and these appellants, to understand that the Taft-Hartley Act vests the Board with appellate jurisdiction over labor matters? Are we to be told that after a duly constituted Federal Court has found that it has jurisdiction, and renders a decision, by appeal to the Board a party to such a decision may have that decision overruled? To state the issue is to indulge in a presumption of egoism unequalled in the annals of American Juris-

prudence. The Taft-Hartley Act makes it too clear in its jurisdictional sections, to-wit, Sections 10(a) and Section 303(b), that the appellate jurisdiction is vested in the Federal Courts, and original jurisdiction in some instances is equally vested there. Appellants feel that to give serious consideration to these contentions of the Board would be a slur and a contempt upon this Court.

Appellants have shown that the Board is not vested with exclusive jurisdiction over labor matters, even over the severe labor situations of unfair labor practices and injunctions. What be the situation, then, if we *assume* jurisdiction in the Board in those situations? The thought leads to the following issue.

IV.

If We Assume That the Board Has Exclusive Jurisdiction Over Unfair Labor Practices, Does This Case Fall Within That Classification of Disputes?

If we assume, for the purpose of examination, that the Board is vested with exclusive jurisdiction over cases involving unfair labor practices, this case still would not fall within the Board's jurisdiction. The reasons appear far too obvious to need stating, but state them we must.

Certain acts are enumerated in Section 8(a) and (b) of the Taft-Hartley Act as constituting unfair labor practices. Since these acts which constitute unfair labor practices are enumerated, it is beyond the power of the Board to declare something other than these specified acts as unfair labor practices. Since this be so by precedent of construction of a legislative act, is there any enumerated section under which the union's acts may be placed in this

instance? An examination of that section of the Act will show that there is no section under which the acts of the appellees can be classified as an unfair labor practice. This alone takes the action away from the jurisdiction conferred by the Act upon the National Labor Relations Board.

It is further a fact established by Board precedent that an employer cannot be held in violation of the Act, or guilty of an unfair labor practice, by refusal to bargain with a non-complying union. In view of this reasoning, which is in every way fair and equitable, can it be incumbent upon an employer or employee to file a charge of unfair labor practices in order to get a declaration of rights? The answer is obviously no. The resort to the Board in such a case would be a mere idle act as there is obviously no relief the Board could grant. The present situation arises from just such a fact situation. Here the Board, and the appellees, insist that appellants have not exhausted their administrative remedy. To that contention appellants must offer this query: In view of these facts, the precedent established by the Board as to its discretion to take or deny jurisdiction, and the apparent inability of the Board to grant declaratory relief, what remedy have appellants before the Board? *The answer is, of course, no remedy at all, and resort to the Board would in this instance, as in the above, be a futile and idle act, as the ultimate resort must be to the Federal District Courts.*

Now let us make a further assumption, and assume that this is an unfair labor practice. The question then arises as to what relief the Board is empowered to grant. Section 10(c) of the Taft-Hartley Act provides only that the Board may issue a cease and desist order for which

appeal to the courts may be had by the Board for enforcement. In brief, the Board is empowered to secure injunctive relief where it finds that unfair labor practices exist. Now this situation immediately presents two further questions:

1. Can the Board issue the declaratory relief requested in this action?
2. Is the Board empowered with the discretion to exercise its jurisdiction or not to exercise it as it (the Board) sees fit?

The first question has already been answered by appellants. We would be facetious to seriously argue, as does the Board in this instance, that the Board is in fact empowered with the jurisdiction to issue declaratory relief. There remains, then, but to answer the second of the two questions.

For a long period there has existed a severe and troublesome argument between the Board and its General Counsel as to whether or not the Board's jurisdiction over unfair labor practices is a discretionary one if the practices in question affect an organization or business engaged in, or affecting, interstate commerce. The Board has taken the position that it may, or may not, as it sees fit, hear a charge of unfair labor practices. In every case where the issue has arisen, the Board has found that it has jurisdiction, but it may decline to exercise it. The General Counsel for the Board has taken the position that if the Board in fact find that commerce is affected, it *must* take jurisdiction and hear the charges. While appellants would agree with the General Counsel, and while the Board's position on this matter is contradictory, appellants believe they can show to the satisfaction of this Court that if the

Board's position in this matter is correct, the section conferring jurisdiction upon the Board is unconstitutional under the "due process" clause of the Fifth Amendment to the Constitution. (Constitution of the United States, Fifth Amendment.) The reasonableness of this construction is made crystal clear by the presentation of a few cases decided by the Board.

Due process of law in legislation requires definiteness, a reasonable relation to a proper legislative purpose, absence of arbitrariness, *and equal application*. (16 C. J. S. 1156.) The guaranty of due process does not prohibit classification for the purpose of legislation, provided there is a natural and reasonable basis therefor, and is not arbitrary or capricious, and is based on a substantial difference between those to whom it applies and those to whom it does not apply, and provided the law is so framed as to extend to and embrace equally all persons who are or may be in the like situation or circumstances. (*United States v. Yount*, 257 Fed. 861; *United States v. Ballard*, 12 Fed. Supp. 321.) Is the Board giving equal application of the Act to the people who come before it requesting a hearing? The following citations will irrefutably demonstrate that the Board is not so doing.

In 1948 the Board exercised its jurisdiction to hear and determine a cause before it involving a drug company, in fact several drug companies and drug stores, and held that these parties were involved in a business affecting commerce sufficiently to warrant the exercise of the Board's jurisdiction, though it was found that the stores sold only one per cent (1%) or less of its merchandise outside of the state where it did business. (*Sam's Pharmacy*, 78 N. L. R. B. 104, Case No. 7-RC-28.) The case involved the determination of whether or not phar-

macists employed should be classified as professional employees, and hence free to choose whatever bargaining agent they might desire, voting independently and apart from non-professional employees. Later in 1948, the Board entertained a petition to determine whether or not certain employees of Cutter Laboratories, Berkeley, California, were professional employees, and hence free to ascertain what collective bargaining unit, if any, they wished to belong. (*In re Cutter's Laboratories*, 80 N. L. R. B. 44, 23 L. R. R. M. 1077.) In both instances, the businesses were small, of the same general class and type, and affecting commerce to virtually the same extent.

However, a few short months ago, the Board declined to exercise its jurisdiction to prevent unfair labor practices in the case of *Haleston Drug Stores, Inc.*, 82 N. L. R. B. 148. Despite the flagrant unfairness of the acts being done by the unions in this case, the Board held that the effect on commerce of the Haleston Stores was of too little consequence for them to exercise their jurisdiction, though they did find that jurisdiction existed. To the same effect are the Board's decisions in *Periera Studio and Photo Finishers Union*, 83 N. L. R. B. 87, and *Smith, H. W., dba A-1 Photo Service and Retail Clerks International Ass'n, AFL*, 83 N. L. R. B. 86; both cases being cited and quoted in appellants' opening brief at page nine (9). Of the same effect is a recent holding in regard to race tracks (*Los Angeles Turf Club* case, Labor Law Reports—Weekly Summary, 63). Now the Board is placed in this position. It finds that it has jurisdiction, on the one hand, but declines to exercise it, regardless of the extent to which the unfair labor practice has gone, if it feels that the effect on commerce is too small. BUT IT STILL REFUSES TO CONCEDE ANY OTHER FORUM TO THIS

CLASS OF PETITIONER FOR THE DESIRED RELIEF, OR ANY RELIEF, as witness the holdings by the California Supreme Court in *Ex parte De Silva*, 199 P. 2d 6, and in *Gerry v. Superior Court*, 194 P. 2d 689. Thus the Board is arbitrarily refusing relief to members of the class to which the law is to apply, and at the same time it refuses to concede jurisdiction in any other forum to hear the belabored petitioner's case. If this position of the Board is to be sustained, we have a law that operates in an unequal manner upon members of the same class. Such is a violation of the due process clause of the Fifth Amendment of the Constitution of the United States. Of course the Board's position cannot be sustained, as such a method of enforcement of the Act was not the intent of the Congress, and the only forum before which such an action as appellants bring here can be heard is the Federal District Court.

V.

Conclusion.

There remains but to summarize the facts and the issues with the proper application of precedent and of just and equitable remedies. Here we have a petitioner who cannot appeal to the Board due to the refusal of the appellee unions to file certain affidavits. In addition, there are petitioners who desire to express their refusal to being coerced into joining a union against their wishes, and indicate that they will seek coercive relief against the employers if forced into such a union. We have a controversy between petitioners and appellees as to the application of the Taft-Hartley Act, a controversy which the National Labor Relations Board has no jurisdiction to decide, either as to the subject matter or as to the relief sought.

There has been shown that the appellees and the Board are contending for a construction of the Act that would result in its unconstitutionality in that provision, a position which is untenable in view of the intent of the Congress which passed the Act. It has been incontrovertibly shown that the only forum to administer Declaratory Relief in this situation is the United States District Court. The Board in its *amicus curiae* brief, has cited much authority, all of it pertaining to completely different and strange factual situations, and none of it in point to the situation at hand. Appellants respectfully submit that the Court can reach no other conclusion but that the District Court has the power to hear and to decide and declare the rights and remedies sought in this action.

If the Board found the facts to be true, and it must be assumed that such facts are true, as this appeal arises upon appellees' motion to dismiss, the equivalent of a demurrer, can this Circuit Court do otherwise than it would have to do on a request for review of findings and conclusions? To compel resort to an idle act defeats the very purpose of the Declaratory Judgments Act and makes it meaningless, if not inoperative, in settling the rights, duties, and obligations of parties subject and amenable to a general federal law.

Respectfully submitted,

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